H.R. 4272, AN ACT TO AMEND CHAPTER 15 OF TITLE 5, UNITED STATES CODE

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 4272

TO AMEND CHAPTER 15 OF TITLE 5, UNITED STATES CODE, TO PROVIDE FOR AN ADDITIONAL, LIMITED EXCEPTION TO THE PROVISION PROHIBITING A STATE OR LOCAL OFFICER OR EMPLOYEE FROM BEING A CANDIDATE FOR ELECTIVE OFFICE

SEPTEMBER 11, 2008

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H.R. 4272, AN ACT TO AMEND CHAPTER 15 OF TITLE 5, UNITED STATES CODE, TO PROVIDE FOR AN ADDITIONAL, LIMITED EXCEPTION TO THE PROVISION PROHIBITING A STATE OR LOCAL OFFICER OR EMPLOYEE FROM BEING A CANDIDATE FOR ELECTIVE OFFICE

THURSDAY, SEPTEMBER 11, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room 2154, Rayburn House Office Building, Hon. Danny K. Davis (chairman of the subcommittee) presiding.

Present: Representatives Davis, Norton, Cummings, Kucinich, and Marchant.

Also present: Representative Stupak.

Staff present: Lori Hayman, counsel; William Miles, professional staff member; and Marcus A. Williams, clerk.

Mr. DAVIS. The subcommittee will come to order.

I welcome Ranking Member Marchant, members of the subcommittee, hearing witnesses, and all those in attendance to the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia's legislative hearing on H.R. 4272, an act to amend the Hatch Act to provide for an additional, limited exception to the provision prohibiting a State or local officer or employee from being a candidate for elected office.

[The text of H.R. 4272 follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 4272

To amend chapter 15 of title 5, United States Code, to provide for an additional, limited exception to the provision prohibiting a State or local officer or employee from being a candidate for elective office.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 4, 2007

Mr. STUPAK introduced the following bill; which was referred to the Committee on Oversight and Government Reform

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A BILL

To amend chapter 15 of title 5, United States Code, to provide for an additional, limited exception to the provision prohibiting a State or local officer or employee from being a candidate for elective office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. EXCEPTION TO PROHIBITION.

(a) IN GENERAL.—Section 1503 of title 5, United States Code, is amended—

(1) by inserting "(a)" before "Section"; and

(2) by adding at the end the following:

"(b)(1) Section 1502(a)(3) does not prohibit any State or local officer or employee from being a candidate for any office of any local unit of general purpose government which has a population of less than 100,000 (determined in accordance with regulations under section 1302(d) based on the most recent population data available under section 183(a) of title 13).

"(2) For purposes of this subsection, the term 'local unit of general purpose government' has the meaning given such term by section 184 of title 13.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The heading for section 1503 of title 5, United States Code, is amended by inserting "**and certain other**" before "**candidacies permitted**".

(2) The table of sections for chapter 15 of title 5, United States Code, is amended by striking the item relating to section 1503 and inserting the following:

"1503. Nonpartisan and certain other candidacies permitted.".

○

Mr. DAVIS. The Chair, ranking member and subcommittee members will each have 5 minutes to make opening statements. And all Members will have 3 days to submit statements for the record.

Hearing no objection, so is the order.

I will begin. The subcommittee today convenes to discuss H.R. 4272, a measure introduced by our colleague, Representative Bart Stupak of Michigan, to provide certain State and local officers and employees an exemption to the Hatch Act provision prohibiting them from being a candidate for office in a partisan election.

While today's hearing is narrowly focused on the Hatch Act and its impact on State and local government employees, the larger question at hand is, to what extent should citizens be restricted from pursuing elected public office for the purpose of promoting efficient and effective governance?

On this, the 7th anniversary of the attacks on 9/11, let us remember those that lost their lives, as well as the rights and freedoms that we as Americans hold so dear. Like the right to vote, the right to be a candidate for an elected office is also fundamental to our unique democratic republic. Yet the Hatch Act attempts to balance this right with concerns over the potentially negative influence of political activity in the administration of general government operations or programs.

Consequently, for decades, most Federal executive branch employees have been subjected to a number of restrictions and rules that details when, where, how and who can participate in political activity or partisan elections. Many of these same restrictions apply to certain State and local employees, particularly those employees of offices whose principal job functions are supported fully or in part by Federal grants or loans.

Although nothing in current statute prohibits State and local employees from running for any elected office if he or she runs as a nonpartisan candidate, we continue to witness a slew of policy challenges, unintended consequences and questions resulting from this specific Hatch Act provision.

This leads us to the subject of today's legislative hearing, which is an examination of the impact that the prohibition on pursuing elective office has on less densely populated areas, the exact issue H.R. 4272 seeks to address. It is my hope that today's hearing will allow us the opportunity to further explore some of these matters.

And I would like to thank today's witnesses for joining us in this afternoon, and I look forward to their testimony.

I would like to yield now to the ranking member, Mr. Marchant, for any opening comments that he might have.

Mr. MARCHANT. Thank you, Mr. Chairman. Thank you for having this hearing today.

The Hatch Act of 1939 is a Federal law whose main provision is to prohibit Federal employees there engaging in partisan political activity. It applies by extension to certain employees of State and local governments whose positions are primarily paid for by Federal funds. However, there are many individuals, such as hospital employees who deal with Medicare and Medicaid, who cannot run for public office because their business receives Federal dollars.

The original intent and purpose of the Hatch Act was to keep partisan politics out of government work. But just because a person

may indirectly receive Federal funds does not mean that they have control over those funds or that their government work can actually be influenced by partisan politics.

This becomes even more complicated when the case of a town or county sheriff is considered. Law enforcement is a major recipient of Federal funds, so what does it mean for a deputy who wishes to run for sheriff, which is a public position?

Additionally, many public positions at the local pay level either pay very little or nothing at all, certainly not enough for a person to quit their day job in order to serve the position.

As a result, the Hatch Act, in its current iteration, severely limits which residents can be elected to serve in local public office.

H.R. 4272 applies this legislation to cities with less than 100,000 residents. I look forward to hearing from the witnesses about their thoughts on applying this bill to cities with less than 100,000 or perhaps there may be a better way of accomplishing the same goal by using a population as a deterrent.

Any possible changes to the Hatch Act should be conducted in a very judicious matter and after careful consideration by this subcommittee.

I appreciate the work of Mr. Stupak on this issue. I look forward to hearing from him and the witnesses today. Thank you.

Mr. DAVIS. Thank you very much, Mr. Marchant.

And now we will actually move to our first witness, who does not need to be sworn in because he is a Member of Congress and has been sworn in when he took his oath of office.

Our witness is the Honorable Bart Stupak, who represents Michigan's First Congressional District, which is geographically one of the largest districts in the country. Congressman Stupak is a member of the House Energy and Commerce Committee and serves as chairman of the Oversight and Investigations Subcommittee.

Prior to coming to Congress, Mr. Stupak was a police officer for 12 years, which led him to create and chair the Congressional Law Enforcement Caucus, a bipartisan organization of more than 100 House Members, which provides the Nation's law enforcement community with opportunities to participate in the legislative process.

Representative Stupak, we thank you so much for being with us, and we are delighted that you have come to share and testify on your legislation this afternoon. The floor is yours.

STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. STUPAK. Thank you, Mr. Chairman, for holding this hearing; Mr. Marchant, for being here and conducting this hearing.

I ask that my full statement be made part of the record, along with the list of examples I have submitted, attached to my testimony, of members of my district, my constituents who have been affected adversely by the Hatch Act; and also a correspondence from Mr. William D. Schneider, who was also affected but he actually wrote a letter that he wished to be a part of the congressional record. So, without objection, I would ask that be made part of the record.

You both summarized what we are trying to accomplish here with this. My district, as the chairman says, is one of the largest districts in the Nation. I have some counties which have very large land mass but very few people, like 10,000 people. The biggest employer in many of my 31 counties that I represent is a hospital, the local hospital.

And if you are an employee of that hospital, the literal reading of the Hatch Act—because most of our offices in Michigan is partisan, from county commissioners, city commissions, drain commissioners. It is always a partisan office. Even judges, in some areas, while not technically partisan, are nominated by the parties; therefore, they are considered partisan. Even though you don't say Democrat or Republican behind it, or independent, the party nominates you.

So what we have found in the last 3 years, if someone doesn't think you should be on the county board of commissioners, they raise the Hatch Act if you work at the hospital, because the hospital receives Federal funding—Medicare reimbursements, Medicaid, sometimes direct grants and appropriations—and people are disqualified.

The sheriff—we have had at least three or four sheriff's candidates. Maybe the sergeant was going to challenge the incumbent sheriff. Right away they used the Hatch Act, because they received Federal money for enforcement of the seat belt law, enforcement of minor in possession to enforce alcohol laws for minors. And these people were considered disqualified underneath the Hatch Act.

We had one city go so far as to say, fine, during this election year of 2008, we will not accept any Federal money even though the purpose is to crack down on underage drinking, speeding, seat belt use; we are just not going to accept it. They had $594. I mean, that was the extent of it. It is not, like, huge sums of money. But because the person was a supervisor who supervised a program, they could not run for office.

It is a constant problem, especially in small, rural areas. It is hard to find people to fulfill a position like county commissioner or city council because of all the headaches you put up with. Everybody in the town knows you, and if something goes wrong, your street isn't plowed in the wintertime, your phone is ringing constantly. And so it is hard to find good, qualified people who are willing to do it. And then when you suddenly raise the Hatch Act, that somehow casts negative aspersions, like you are violating the Federal law, people have resigned, people have not accepted appointments. It has been used more as a political weapon as to the true intent and spirit of the law.

So the only suggestion I could come up with was counties less than 100,000, that the Hatch Act not apply. I am open to any suggestion to try to resolve this.

I think the literal interpretation of the law has been carried to extremes, where people who are an employee of an agency that may receive Federal funds, they are disqualified from being in a partisan office. And according to our constitution in Michigan, just about every office is partisan. It really disqualifies a lot of people who have good intentions, public service at the heart of what they

are trying to do. But it is being used as a political weapon by both parties, and no one is immune from this one.

So I am open to suggestions. I wish we could move this legislation. We have already had the primary season; it is probably too late for this year. But next year, 2009, our city elections, which are partisan—and I am going to be facing this same issue again next year in 2009.

So anything we can do to move this process along to, you know, protect the intent and spirit of the Hatch Act but not disqualify qualified people because their agency may receive some Federal money, I am open to suggestions.

And I would extend my discussion and my testimony here. I am happy to answer any questions you may have.

[The prepared statement of Hon. Bart Stupak follows:]

STATEMENT OF BART STUPAK
MEMBER OF CONGRESS
BEFORE THE
SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE AND THE DISTRICT OF COLUMBIA
SEPTEMBER 11, 2008

Thank you, Chairman Davis and Ranking Member Marchant, for holding this hearing and for allowing me to testify before the Subcommittee on my legislation, H.R. 4272, to modernize the Hatch Act.

The Hatch Act was established by Congress in 1939 and one year later Congress extended coverage under the Act to state and local employees. As a result, all employees subject to the Hatch Act are not allowed to run for elective office in a partisan election. An employee is subject to the Hatch Act if their principal employment is directly connected to federal grants, loans, reimbursements (including Medicaid), and subsidies.

Over the past two years, several local officials and residents who live and work within 5 different counties in Michigan's First Congressional District have been negatively affected by the Hatch Act. These individuals have received written correspondence from the Office of Special Counsel indicating that they are in violation of the Hatch Act or have come to this conclusion through the assistance of other legal counsel. To comply with the Hatch Act, these individuals have chosen not take office, resign from office, not run for re-election, and not run for office at all.

Some local governments have even chosen to stop receiving federal funding. For example, in March 2008, the Ishpeming City Council voted unanimously to stop accepting all federal grant and loan funding for the Ishpeming Police Department through December 31, 2008 so that it would no longer impede Jim Bjorne, the Ishpeming Police Chief, from running for Marquette County Sheriff. Prior to this decision, the City of Ishpeming had received $594 through three federal programs which the City joined in October 2007 including drinking and driving, minors in possession, and seat belt and speed enforcement campaigns. While this may not seem like much money, these grants make a big difference in the budget of a small, rural police department.

Because northern Michigan is a rural area, a significant majority of the residents are employed by an organization that receives government funding. For example, hospitals are one of the largest employers in my Congressional District. Since these hospitals receive federal funds, a number of hospital employees are covered by the Hatch Act.

While the Hatch Act was originally established to eliminate partisan appearances and partisan connections to federal funding, these restrictions are hurting rural America by disqualifying several capable citizens from serving their communities.

If an individual is in violation of the Hatch Act, they must either resign or retire from their current employment in order to continue to run for a partisan office. However, most publicly elected officials in rural areas cannot afford to quit their job because the elected positions in

these smaller communities do not provide a large enough salary to live on. As a result, the Hatch Act severely limits which residents can serve in local office.

To provide relief to the residents of northern Michigan and others throughout the country, I have introduced legislation to establish an exemption in the Hatch Act for rural communities. H.R. 4272 would allow state and local employees who may not currently be able to run for local office due to the Hatch Act to be candidates in a partisan election if they are running for local office in a county with a population of less than 100,000 people.

Public service is important in every community. The last time the Hatch Act was amended was in 1993 to allow federal employees to take an active role in political campaigns in federal races. Now, it is time for Congress to revise the Hatch Act so that Americans in rural communities can fully participate in their local governments.

I urge the Subcommittee to act on H.R. 4272, to provide qualified candidates the opportunity to serve their community without having to be concerned about where they are employed.

Thank you.

EXAMPLES OF HATCH ACT CASES IN NORTHERN MICHIGAN

An individual in Charlevoix County, currently the Under Sherriff, wished to run for the Charlevoix County Sheriff position. After learning from the Office of Special Counsel that they were in violation of the Hatch Act, this individual took measures to remove all of their responsibilities and oversight roles which dealt with federal programs used by the Charlevoix County Sheriffs Department. Upon making these changes, the Office of Special Counsel cleared this individual to run for partisan office.

An individual in Marquette County, currently the Ishpeming Police Chief, wished to run for the Marquette County Sheriff position. After learning from the Office of Special Counsel that they were in violation of the Hatch Act, the Ishpeming City Council voted to stop accepting all federal grant and loan funding for the Ishpeming Police Department through December 31, 2008. Prior to this decision, the City of Ishpeming had received $594 through three federal programs which the City joined in October 2007 including drinking and driving, minors in possession, and seat belt and speed enforcement campaigns. Upon making these changes, the Office of Special Counsel cleared this individual to run for partisan office.

An individual in Schoolcraft County resigned from their position as Schoolcraft County Commissioner after the Office of Special Counsel determined they were in violation of the Hatch Act. The individual worked as a clinical therapist with Hiawatha Behavioral Health. Hiawatha Behavioral Health receives Medicaid and Block Grants from the federal government. The individual provided outpatient counseling to patients whose mental health services were paid for by Medicaid.

An individual in Schoolcraft County was elected as a Schoolcraft County Commissioner. The individual worked as a licensed medical social worker at Schoolcraft Memorial Hospital and served on the Board of the Schoolcraft Health Access Coalition (SHAC). The Office of Special Counsel determined that this individual was in violation of the Hatch Act because they received reimbursements from SHAC for attending a conference on behalf of the organization and for supervising the Program Director. SHAC receives funding from a federal Healthy Communities Access Program grant. This individual resigned before being sworn into office.

An individual in Schoolcraft County choose not to seek re-election as a Schoolcraft County Commissioner after being appointed to the position. This individual worked at the Menominee-Delta-Schoolcraft Community Action Agency which receives federal funding through FEMA and Community Service Block grants.

An individual in Delta County withdrew their candidacy for Delta County Commissioner after the Office of Special Counsel notified them that their candidacy was in violation of the Hatch Act. This individual was employed as a conservation officer with the Michigan Department of Natural Resources.

An individual in Delta County withdrew their candidacy for Delta County Commissioner after the Office of Special Counsel notified them that their candidacy was in violation of the Hatch Act. This individual was employed as the executive director of Delta Area Transit Authority.

An individual in Delta County was appointed by the Delta County Board to fill an open position on the Delta County Road Commission. This individual was employed as the executive director of the Delta Conservation District.

An individual in Baraga County resigned from their position as Baraga County Commissioner after studying the Hatch Act and determining that they were likely in violation of the Hatch Act. This individual worked as an Emergency Manager.

Mr. DAVIS. Thank you very much, Representative Stupak. I have only got a couple of questions. And I thank you for your testimony and for your leadership.

I would like to ask if you would like to join the panel once we have finished with questioning and participate in the hearing.

Mr. STUPAK. I would be happy to.

Mr. DAVIS. Then, at that rate, I would like to ask unanimous consent that Representative Stupak be allowed to join us and participate.

Mr. MARCHANT. Yes.

Mr. DAVIS. Hearing no objection, we would be delighted to have you.

The other question that I have is your bill creates a 100,000 population threshold level for exemption from the Hatch Act that prohibits State and local employees from running for office. Is there a particular reason for the 100,000 threshold?

Mr. STUPAK. I have half the State, geographically. None of my counties—I think the biggest county is 70,000. So I could take it all into my whole district in consideration. So it would be at least resolved throughout my district. That is the only reason I put 100,000.

Like I said, I am open to suggestions, whatever ideas you have. I don't want to necessarily put an arbitrary number, and if your county goes over so, I mean, you have the same problems. But I am open to suggestions. That is how I came up with it.

Mr. DAVIS. One of the reasons I think I asked the question is that there are jurisdictions that, for example, in my State where individuals seek to run for the State legislature—people can run for the city council, because our city council elections are nonpartisan. But if they run for the legislature and happen to work for the State or any place where Federal funds are being used to fund a part of their salary, then, of course, technically they cannot run. And some of those districts may have a bit more than 100,000 population, and that was my rationale for asking the question.

Mr. STUPAK. I agree. And if there is some way we could tighten up this language—before I ran for State office, State House of Representatives, our law firm represented the city in litigation and also some other matters in which Federal money came in. So, to avoid that issue, I resigned from the law firm to run for public office. Now, I had the ability to do that. Not every candidate has the ability to do that.

Did I have any control over that Federal money? No. Did I direct the Federal money? Did I do anything like this? Was I the grantwriter? No. I was a lawyer who represented the city in legal matters, and therefore I would have been disqualified underneath the Hatch Act to even seek the nomination of my party because of this. It would have been used as a political tool against me.

So I am open to any suggestion you have. I don't know if it is tightening the language or what.

But for a person who works at the hospital, because the hospital receives Medicare and Medicaid money, to be disqualified, as in this person who was appointed by the county board of commissioners upon the death of a commissioner in Schoolcraft County, which is a county of maybe 30,000, and then the opponents had

him disqualified and basically publicly smear him for violating the law, the trust, because he worked at the hospital as a social worker. He had no control of the budget, no control of the money. He was paid by Schoolcraft. He had nothing to do with Federal money coming in, other than Federal money flowed into the program he administered for Medicaid people, people on Medicaid.

That is what I am trying to get at. Any suggestions you have, I am open to suggestions.

Mr. DAVIS. Thank you very much.

Mr. Marchant, do you have any questions for Representative Stupak?

Mr. MARCHANT. No, I don't. I look forward to the panel. Thank you.

Mr. DAVIS. Then thank you very much. And if you care to join us, please do so.

We will then proceed to our next witness.

And our next witness is Neil A.G. McPhie, who is chairman of the Merit Systems Protection Board, which is an independent quasi-judicial agency established to protect Federal merit systems against partisan political and other prohibited personnel practices and to ensure adequate protection for employees against abuses by agency management.

Prior to serving in this capacity, Chairman McPhie worked as the executive director of the Virginia Department of Employment Dispute Resolution.

We also have Mr. Anthony Guglielmi. He is the director of congressional and public affairs at the U.S. Office of Special Counsel, an independent Federal investigative and prosecutorial agency. The OSC protects Federal employees and applicants from prohibited personnel practices.

Before being appointed to this position, Mr. Guglielmi served as the deputy director and chief of staff for the Armed Forces Foundation and director of communication for the New York State Senate and Connecticut Board of Parole.

If you gentlemen would stand and raise your right hands to be sworn in, as it is the policy of this committee to swear in all witnesses.

[Witnesses sworn.]

Mr. DAVIS. The record will show that the witnesses answered in the affirmative.

We thank you all very much for coming and for being here.

And we will begin, Chairman McPhie, with you.

STATEMENTS OF NEIL A.G. MCPHIE, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD; AND ANTHONY GUGLIELMI, DIRECTOR OF CONGRESSIONAL AND PUBLIC AFFAIRS, U.S. OFFICE OF SPECIAL COUNSEL

STATEMENT OF NEIL MCPHIE

Mr. MCPHIE. Thank you, Chairman Davis and Ranking Member Marchant, for the opportunity to come before you and share information on the role of the MSPB in enforcing the Hatch Act.

I have been asked to address three areas: first, the MSPB views on the bill itself, H.R. 4272; to the extent of MSPB's Hatch Act case

law; and the nature of the decisions rendered in cases involving State and local defendants.

Mr. Chairman, because the Board is a quasi-judicial agency and we hear these Hatch Act cases, we can take no position on the merits of the bill. Our view is whatever you pass, we must adjudicate.

Moreover, H.R. 4272 will have minimal impact on the Board's caseload. Hatch Act cases involving State or local government employees represent less than 1 percent of MSPB's overall caseload.

My testimony, therefore, will focus more on the MSPB's procedures for adjudicating these cases and the extent of a Hatch Act caseload with a summary of the outcomes of the cases that we have had.

MSPB adjudicates cases on the act when the special counsel files a complaint seeking disciplinary action for an alleged violation of the act. That complaint is heard by an administrative law judge, whose services are provided to the Board under a special interagency agreement with the NLRB.

Generally, hearings are open to the public, and the procedures applicable to MSPB appellate cases also apply to Hatch Act cases. The Board does not have authority to consider a complaint alleging a violation of the act by an individual who is a Presidential appointee with Senate confirmation. The Board's decision that a State or local agency employee violated the Hatch Act is reviewable by an appropriate U.S. district court.

If the ALJ or the Board, on a petition for review, determines that an employee of a State or local agency whose principal employment is in connection with an activity financed in whole or in part by Federal funds has violated the act, the outcome, as mandated by the act, is the penalty of removal or the determination that no penalty is warranted. There is no in-between ground.

In an action where the determination of removal is warranted, the ALJ or the Board on review will notify the employing agency and the employee that the employee must be removed and not reappointed within 18 months of the date of the decision. If the State or local agency fails to comply with such an order or reinstates the employee within 18 months of the removal, the ALJ or the Board may order the Federal entity providing funding to the agency to withhold funds from the agency. The amount to be withheld may be the equivalent of 2 years of pay for the subject employee.

Now, in terms of the Hatch Act cases, MSPB receives approximately 8,400 appeals each year. Its Hatch Act caseload is a small percentage of those appeals. From January 2002 to July 31, 2008, the Office of Special Counsel brought 41 Hatch Act cases before the Board. Of that total, 23 cases involved State or local employees.

The most frequent types of Hatch Act violations that were committed by State or local agency employees included running as a candidate in a partisan election and using official authority to influence the outcome of such an election. Final disposition in these cases include settlement of eight cases, a finding that no Hatch Act violation occurred in one case, dismissal of two cases, and removal of nine employees. One employee retired prior to completion of the case, and two cases are currently pending.

As the data shows, the Hatch Act case is a very small part of the Board's caseload. But regardless, the disposition of these cases

are significant to the Board's statutory mission of ensuring a merit-based Federal civil service system. As a result, the Board tries to adjudicate these cases promptly and efficiently and in a manner that comports with the congressional intent underlying the act.

I remain open to any questions the committee may have.

[The prepared statement of Mr. McPhie follows:]

Hearing Statement of
The Honorable Neil A. G. McPhie, Chairman
U.S. Merit Systems Protection Board

Before the

House Committee on Oversight and Government Reform
Subcommittee on the Federal Workforce, Postal Service and the District of Columbia

Legislative Hearing on H.R. 4272: A bill providing limited exceptions to the Hatch Act

September 11, 2008

Thank you, Chairman Davis, Ranking Member Marchant and members of the Subcommittee for the opportunity to share information regarding the role of the U. S. Merit Systems Protection Board (MSPB) in enforcing the Hatch Act. The Subcommittee has asked me to address the following areas:

1. The MSPB's views on H.R. 4272;
2. The extent of the MSPB's Hatch Act caseload; and
3. The nature of the decisions rendered in cases involving state and local defendants.

Mr. Chairman and Subcommittee members, because the Merit Systems Protection Board is a quasi-judicial agency and adjudicates cases under the Hatch Act, the MSPB takes no position on the

substantive or procedural provisions of the proposed amendments in order to avoid any appearance of prejudgment. Moreover, H. R. 4272 would have minimal impact upon the Board's caseload. Hatch Act cases involving state or local employees represent less than one percent of the MSPB's overall caseload. My testimony will, therefore, focus on MSPB's procedures for adjudicating cases under the Hatch Act and the extent of our Hatch Act caseload with a summary of the outcomes of those cases.

ADJUDICATION OF HATCH ACT CASES BEFORE THE MSPB AND RIGHT OF JUDCIAL REVIEW

MSPB adjudicates cases under the Hatch Act when the Special Counsel files a complaint seeking disciplinary action for an alleged violation of the Act. The complaint is heard by an Administrative Law Judge (ALJ) whose services are provided to the MSPB under the terms of an inter-agency contract with the National Labor Relations Board. Generally, hearings are open to the public and the procedures applicable to MSPB appellate cases also apply to Hatch Act cases. The Board does not have authority to consider a complaint alleging a violation of the Hatch Act by an individual who is a Presidential appointee with Senate confirmation. The Board's decision that a state or local agency employee violated the Hatch Act can be reviewed by an appropriate U.S. district court.

ALLEGATIONS AGAINST STATE EMPLOYEES

If the ALJ (or the Board upon petition for review) determines that an employee of a state or local agency whose principal employment is

in connection with an activity financed in whole or in part by Federal funds has violated the Hatch Act, the outcome, as mandated by the Act, is the penalty of removal or a determination that no penalty is warranted. In an action where there is a determination that removal is warranted, the ALJ (or the Board on petition for review) will notify the employing agency and the employee that the employee must be removed and not reappointed within 18 months of the date of the decision. If the state or local agency fails to comply with such an order or reinstates the employee within 18 months of the removal, the ALJ or the Board may order the Federal entity providing funding to the agency to withhold funds from the agency. The amount to be withheld may be the equivalent of two years of pay for the subject employee.

THE MERIT SYSTEMS PROTECTION BOARD'S HATCH ACT CASELOAD

MSPB receives approximately 8,400 appeals in its headquarters, regional and field offices each year. Its caseload of Hatch Act matters is a small percentage of those appeals. From January 2002 to July 31, 2008, the Office of the Special Counsel brought only 41 Hatch Act cases before the Board. Of that total, 23 cases involved state or local employees. The most frequent types of Hatch Act violations that were committed by state or local agency employees included: running as a candidate in a partisan election and using official authority to influence or affect an election.

Final dispositions in these cases included settlement of 8 cases, a finding that no Hatch Act violation occurred in one case, dismissal of 2

cases, and removal of 9 employees. One employee retired prior to completion of the adjudication of the case and two cases are pending.

CONCLUSION

As the data show, Hatch Act cases are a very small part of the MSPB's overall caseload. However, these cases are very significant to the MSPB's statutory mission of ensuring a merit-based Federal civil service system. The Board endeavors to adjudicate these cases promptly and efficiently, and in a manner that comports with the congressional intent underlying the Act. I would be happy to answer questions from the panel at this time.

Mr. DAVIS. Thank you very much, Chairman McPhie.

And we will proceed now to Mr.—let me make sure that I am pronouncing your name correctly.

Mr. GUGLIELMI. It is pronounced "Smith," Mr. Chairman. [Laughter.]

No. "Guglielmi."

Mr. DAVIS. Guglielmi.

STATEMENT OF ANTHONY GUGLIELMI

Mr. GUGLIELMI. Thank you, sir.

Chairman Davis, Ranking Member Marchant and members of the committee, good afternoon, and thank you for the opportunity to provide our perspectives on H.R. 4272.

At the outset, I would like to request that my written statement also be included in the record.

My name is Anthony Guglielmi. I am the director of congressional and public affairs for the U.S. Office of Special Counsel, an independent investigative and prosecutorial agency.

I am accompanied today by Ms. Ana Galindo-Marrone, chief of our Hatch Act unit.

As each of you know, the Hatch Act restricts the political activity of certain State and local government employees. Among other things, the act prohibits such employees from being candidates in partisan elections. H.R. 4272 would create an exception to this prohibition by allowing employees to run in partisan elections for local office in counties or municipalities with populations of less than 100,000.

The Office of Special Counsel takes no position on H.R. 4272, but offer a recommendation to address concerns underlying this bill.

First, OSC is concerned that this bill's choice of 100,000 as the population threshold for its candidacy exception will have a broader effect than intended. According to Census Bureau estimates, 75 percent of Michigan counties have populations of less than 100,000. Further, 99.6 percent of Michigan municipalities have populations of less than 100,000, including the cities of Dearborn, Canton and Kalamazoo. Thus, the bill impact extends beyond rural-area employees.

There will also be disparate outcomes for employees in cities that are close in proximity and size. For example, in Michigan, the cities of Dearborn and Livonia are less than 20 miles apart. Both are just outside the city of Detroit. However, in 2002, Livonia had about 2,600 more people than Dearborn, pushing it above the 100,000 population cutoff. Thus, a Michigan State employee could have run for public office in Dearborn but not in Livonia.

Also, in 2003, Livonia's population dropped below 100,000. So an employee would have been able to run for office in 1 year but not the next.

It is also likely that this bill will increase OSC's workload. In addition to determining whether a State or local employee has the duties in connection with federally funded programs, this bill would require us to research the population of a locality where the employee wants to run. Because populations are ever-changing, our research will have to remain current and continuous.

OSC's greater concern with this bill is the potential confusion it could create for Hatch Act-covered employees. While such employees would be permitted to run in partisan elections, they still would be subject to the act's other two prohibitions against coercion and misuse of official authority. OSC believes that this may cause confusion, resulting in violations of the act. We have seen this occur with the candidacy exemption currently in place for individuals holding elective office. Many times, elected officials often believe they are exempt from all of the provisions of the act, even though they remain subject to the other two important provisions, thus potentially leading to more egregious Hatch Act violations.

For example, OSC filed a complaint with the Merit Systems Protection Board against an elected county official for multiple violations of the Hatch Act. The official, during job interviews, made it clear that contributions to his political party were expected. He also directed a subordinate to solicit other employees to attend fundraisers, contribute to his party, and volunteer for his re-election campaign.

This example is an egregious one, but unfortunately it is not the only one. OSC has seen an increase of allegations of both candidacy and coercion. These cases involve employees in positions of authority who are running for office and are reported to be using their positions to bolster their campaign credentials and/or coerce subordinates to support their campaign.

Partisan candidacy magnifies the risk that these activities will intrude in the workplace. These cases are also difficult to investigate and prove, because witnesses are reluctant to cooperate for fear of reprisal.

OSC understands and respects Representative Stupak's concern for employees in rural areas. However, Congress does not need to amend the Hatch Act to address that concern. The Hatch Act does not prohibit employees from being candidates in nonpartisan elections. Therefore, the Congressman's concerns could be resolved at the State and local level.

State and local governments are in the best position to recognize whether a local community lacks eligible candidates. If they identify such a problem, they choose to resolve it by designating those elections as nonpartisan. In fact, in our experience, we have found that many localities have designated their elections nonpartisan. Thus, the concerns underlying H.R. 4272 can be addressed without compromising the integrity and neutrality of Federal programs.

Thank you very much for your attention. I would be happy to answer any questions.

[The prepared statement of Mr. Guglielmi follows:]

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POSTAL SERVICE AND THE DISTRICT OF COLOMBIA

STATEMENT OF

ANTHONY J. GUGLIELMI

DIRECTOR OF CONGRESSIONAL AND PUBLIC AFFAIRS

U.S. OFFICE OF SPECIAL COUNSEL

Before The:

UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT & GOVERNMENT REFORM

SUBCOMMITEE ON FEDERAL WORKFORCE, POSTAL SERVICE AND THE DISTRICT OF COLOMBIA

HR 4272

AN ACT TO AMEND CHAPTER 15 OF TITLE 5, UNITED STATES CODE, TO PROVIDE FOR AN ADDITIONAL, LIMITED EXCEPTION TO THE PROVISION PROHIBITING A STATE OR LOCAL OFFICER OR EMPLOYEE FROM BEING A CANDIDATE FOR ELECTIVE OFFICE.

Thursday September 11, 2008

2154 Rayburn House Office Bldg

Washington, D.C.

Chairman Davis, Ranking Member Marchant, and members of the committee: good afternoon and thank you for the opportunity to testify today. My name is Anthony J. Guglielmi and I am the Director of Congressional and Public Affairs for the U.S. Office of Special Counsel (OSC), an independent investigative and prosecutorial agency. I appreciate the opportunity to appear before you today to provide our perspectives on HR 4272. The Special Counsel appreciates your request for OSC's perspective and wished he could be here but had a previous out of office engagement on OSC business that prevents his being here. However, I have brought an expert in Hatch Act state and local enforcement, and you will be able to receive the full complement of OSC expertise and perspective.

As each of you know, the Hatch Act restricts the political activity of individuals principally employed by state, county or municipal executive agencies in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency. The Office of Special Counsel (OSC) is the sole agency with exclusive jurisdiction to enforce the Hatch Act. The Act prohibits such employees from, among other things, being candidates in partisan elections for public office. H.R. 4272 would create an exception to this prohibition by allowing employees to be candidates in partisan elections for local office in counties or municipalities with populations of less than 100,000.

OSC takes no position on whether Congress should enact H.R. 4272. However, we feel it prudent to discuss the effects of the legislation and its potential impact on OSC's mission to enforce the Hatch Act. In addition, we offer a recommendation on how to address the underlying issue that prompted this proposed legislation without amending the Act.

First, OSC is concerned that H.R. 4272's choice of 100,000 as the population threshold for its candidacy exception will have a broader effect than intended. If enacted, this legislation will have a far-reaching impact. For example, according to population estimates from the U.S. Census Bureau's website, 75 percent of counties in the State of Michigan have populations of less than 100,000. Further, 99.6 percent of municipalities in

the State of Michigan have populations of less than 100,000, including cities like Dearborn, Canton and Kalamazoo. Thus, it is not just employees in rural areas of Northern Michigan who would be affected by this legislation.[1]

Further, in some cases, employees could see disparate outcomes in cities that are close in proximity and close in size. For example, in Michigan, the cities of Dearborn and Livonia are less than twenty miles apart – both are just outside the City of Detroit. However, in 2002, Livonia had about 2,600 more people than Dearborn, pushing it above the 100,000 population cutoff. Thus, a State of Michigan employee could have run for public office in Dearborn but not in Livonia.

In addition, in 2003, Livonia's population dropped below 100,000. So, an employee who was unable to run for office in Livonia in 2002 would have been able to do so the next year. Generally, populations change from year to year. An employee who runs for office in a municipality with a population of slightly less than 100,000 may see his ability to run for reelection vanish the next election cycle when the municipality's population rises above 100,000. OSC foresees such disparate outcomes resulting in increased litigation over both OSC's enforcement and the census data on which it relies.

In that same vein, it is likely that this legislation will increase the workload for OSC's Hatch Act Unit. In addition to determining whether a state or local government employee has duties in connection with federally funded programs, this legislation would require OSC to research the population of the county or municipality where the employee wants to run for

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[1] Examples of other states, according to population estimates from the U.S. Census Bureau's website, include: Ohio, with 68 percent of its counties and 99.7 percent of its municipalities having populations under 100,000; New York, with 55 percent of its counties and 99 percent of its municipalities having populations under 100,000; Florida, with 43 percent of its counties and 95.6 percent of its municipalities having populations under 100,000; and California, with 40 percent of its counties and 87 percent of its municipalities having populations under 100,000.

office. As mentioned above, populations change from year to year, so our research will have to remain current and continuous.[2]

OSC's greater concern with H.R. 4272, though, is the potential confusion it could create for employees who are subject to the provisions of the Hatch Act. While such employees, under the proposed legislation, would be permitted to run in partisan elections for local office in areas with a population of less than 100,000, they still would be subject to the Act's other two prohibitions -- the prohibitions against using their official authority or influence to affect the result of an election and coercing employees to contribute anything of value for political purposes. OSC's concern is that, because of the candidacy exception, employees may not realize that they still are subject to these two prohibitions, and thus, may violate them. We have seen this confusion occur with the candidacy exception currently in place for individuals holding elective office. Many times, these elected officials believe they are exempt from all of the provisions of the Hatch Act, even though they have duties in connection with federally funded programs and are subject to the other two provisions of the Act.

In addition, OSC is concerned that by allowing employees to be candidates in certain partisan elections, these employees will be more prone to violate other provisions of the Act. It is only natural that individuals are the most partisan when they are running for office, and it may be difficult for employees who are candidates to leave their partisan politics at the door when they come to work. Thus, OSC sees the potential for more egregious violations of the Hatch Act by employees who bring their candidacies into the workplace by, for example, coercing subordinates to campaign for or support them or using agency resources to further their candidacies. Again, we have seen this happen with elected officials who are exempt from the candidacy prohibition. Some of the most serious violations of the Hatch Act have

[2] In addition, OSC is unclear what census data it should rely on to determine whether an employee can be a candidate for local office in a certain locality – data from the decennial census or the population estimates done every year by the U.S. Census Bureau.

involved elected officials coercing subordinates to engage in activities in furtherance of their candidacies.

For example, OSC filed a complaint with the Merit Systems Protection Board against an elected county prosecutor for multiple violations of the Hatch Act. This prosecutor, during interviews of potential employees, would make it clear that contributing money to his political party was expected of employees. Further, he directed a subordinate employee to solicit other employees to attend political fundraising events or contribute to his political party and to volunteer for his reelection campaign. He also requested another subordinate employee to hold office within his political party, which she agreed to do. In addition, he announced his candidacy on the agency's official website.

This example is an egregious one, but unfortunately, it is not the only one. The Hatch Act Unit has seen an increase over the past year or so in allegations dealing with both candidacy and coercion. These cases involve employees in positions of authority who are running for office and are reported to be using their positions to bolster their campaign credentials and/or coerce subordinates to support their campaign. These cases are difficult to investigate and prove because, understandably, witnesses are not always willing to openly speak to OSC for fear of reprisal. However, prohibiting an employee from being a candidate in a partisan election diminishes an employee's personal interest or motivation for engaging in such activities in the first place.

OSC understands and respects Representative Stupak's concern that in rural areas, the Hatch Act sometimes can reduce the number of qualified candidates who can serve their communities through local elective office. Congress need not amend the Hatch Act, however, to address this problem. The Hatch Act does not prohibit employees from being candidates in nonpartisan elections. Therefore, this problem can be resolved at the state and local level. State and local governments are in the best position to recognize whether a local community lacks qualified candidates for public office. If they identify this problem, they can then make the decision to solve it by designating these local elections nonpartisan. In

fact, in our experience investigating cases and advising employees across the country, we have found that many localities have designated their elections nonpartisan. Thus, the concerns raised today can be addressed without compromising the integrity and neutrality of federal programs. Local governments are free to exercise their power to hold nonpartisan elections if they are having difficulty locating candidates to run for public office.

Thank you for your attention, I would be happy to answer any questions you may have.

[END]

Mr. DAVIS. Thank you very much.

And we will begin the questioning process.

Let me begin with you, Chairman McPhie. In your testimony, you stated that, since January 2002, the Office of Special Counsel has brought 41 Hatch Act cases before the MSPB, of which 23 involved State or local employees.

How many of the 23 cases involved State or local employees running in partisan elections? And are there any commonalities among these cases? For example, are there any recurring arguments for why employees continue to run for office despite Hatch Act restrictions?

Mr. MCPHIE. Mr. Chairman, I could answer that in a context of some of the defenses offered by these employees when these cases are brought. I asked that same question myself.

Although a particular defense is going to be necessitated by what the circumstances are, to the extent one can generalize, these are the kinds of defenses that seem to come about: ignorance as to the existence of the Hatch Act; ignorance as to the political activities prohibited by the Hatch Act—for instance, limitations on the use of government e-mail by government employees to send partisan political communications, there is uncertainty; lack of understanding as to whether an employee's position is covered by the Hatch Act, particularly with respect to certain employees of State and local agencies who may not realize that their employment relates to an activity which is financed in whole or in part by loans or grants through this Federal Government.

Also, another common defense is that the penalty is too severe, the penalty proposed by OSC is too severe.

I think I have answered the question. If I haven't, I——

Mr. DAVIS. Well, let me ask you, in your statement, you also stated that Hatch Act cases involving State and local employees represent less than 1 percent of the MSPB's overall caseload. Has this percentage remained consistent since the last major reform of the Hatch Act, which was in 1993?

Mr. MCPHIE. I cannot answer that with certainty, but I believe that is true. I have given you 41 cases over 6 years. I am not aware of any spike in these cases, certainly not during my tenure on the Board.

Mr. DAVIS. Thank you very much.

Let me ask you, Mr. Guglielmi——

Mr. GUGLIELMI. Mr. Chairman, "Anthony" is fine.

Mr. DAVIS. Andy? All right.

In testimony that we are going to hear shortly, it has been claimed that, in 1974, major changes to the Hatch Act were made which eliminated most of the Federal restrictions on off-duty, free-time, political activities for State and local governments. In 1983 and 1987, surveys were conducted by House committees which showed that these changes did not increase the incidence of reported violations or abuses.

Based on this history, why then do you feel that allowing State and local employees to run for partisan office would cause current employees to ignore and violate the other Hatch Act restrictions that would remain in place?

Mr. GUGLIELMI. Mr. Chairman, if it pleases the committee, I would like to invite Ms. Galindo-Marrone, who is the chief of the Hatch Act unit, to answer that question, as she has experience as an attorney.

Mr. DAVIS. Please, by all means.

Ms. GALINDO-MARRONE. Good afternoon, Chairman Davis.

Although the restrictions of the Hatch Act were certainly loosened for State and local employees starting in 1974, three key prohibitions remained in place: the candidacy prohibition, as well as the coercion and use of official authority prohibition.

And based on our experience, people are at their most partisan when they are engaged in candidacy, when they are candidates and they are running for office. So that, although the restrictions that were loosened in 1974 allowed individuals to engage in political activity off-duty, with respect to the prohibition on candidacy, it is very difficult for someone to remove their partisan hat when they get to the workplace. When you are running for office, you are running for office 24/7.

Mr. DAVIS. Let me ask you, why would it be that an individual would be more enthused about campaigning or running if they were running for a partisan office or under a partisan banner than they would if they were running under a nonpartisan banner?

Ms. GALINDO-MARRONE. Certainly. With respect to the Hatch Act, the activity that it is intended to capture or interdict is partisan activity. So, although I understand your question in terms of the enthusiasm that might be shared in both instances, the Hatch Act only prohibits partisan activity.

Mr. DAVIS. I asked that because, based upon my experiences in a town of course that is kind of well-known for its politics, our most vociferous elections are actually the local city council elections, and they are nonpartisan. I mean, people really get into who is going to be their member of the city council, more than they do who is going to be their Congressman or whatever. I mean, I don't know if that is the case in some other places, but certainly in the community where I live, I mean, that is pretty much the case.

Well, let me go to Mr. Marchant and provide him the opportunity to ask questions.

Mr. MARCHANT. Well, first of all, I have been in Texas politics for 28 years, and I don't recall this ever being the subject of a challenge for an election. So this a new subject for me. I was a council member, a mayor, State legislator, and then now in Congress. And I never remember this being a substantive issue or the subject of a challenge for a candidacy.

So I guess my question to the panel is, would this affect some States much more than it would other States? Would any of the States view this to be preemptive or something that we would be overriding their State authority?

And the last question is, is the 100,000 number a number that moves things one way or the other? I mean, if it were a million or if it were 10,000—is that 100,000 number a meaningful number? Or is it—I think Mr. Stupak identified it as just kind of a beginning place. So I would ask that question of either of the two or of your counsel.

Mr. GUGLIELMI. Congressman, I will answer the latter part of the question. Definitely, I mean, it doesn't matter the number, the impact on the Office of Special Counsel would be the same. We would still have to rely on, you know, census data, and it would still apply a greater burden, you know, than we are currently experiencing.

Mr. MARCHANT. OK.

Mr. GUGLIELMI. And then as far as the—I mean, I have no comment on how the States would perceive the legislation, sir.

Mr. MARCHANT. Would one State be affected more than another State? Do these cases get tried in every State, or are there States that are more active in their pursuit of Hatch cases?

Ms. GALINDO-MARRONE. It applies across the board, and we receive complaints from all 50 States. But it does seem to also be cyclical in nature. And what I mean by that, sometimes it may be Michigan, other times it may be Ohio, Pennsylvania. Depending on the election season, the Hatch Act sometimes reaches greater awareness with the candidates and the citizenry than in other times. So it is very active currently in Michigan.

Mr. MARCHANT. OK. And I have a followup question that——

Mr. MCPHIE. In terms of impact, let me put it to you this way. The Board isn't planning to ramp up any of its resources in anticipation of an increase in Hatch Act cases. I mean, the history speaks for itself, so far as we are concerned. Forty-one cases over 6 years is, by any stretch of the imagination, a very small number. I recall almost—I have been there since 2003, and I have seen very few of these cases. There is no steady diet of these cases at all.

In terms of impact, 100,000, 200,000, I can't begin to answer that question. It is not something that we concern ourselves with. We follow whatever the statute says. And if a case is brought by special counsel, then it proceeds on the merits in that case pursuant to the statute. If the statute says 100,000, we take it from there. If it says 200,000, we take it from there. It doesn't matter to us.

Mr. MARCHANT. As I understand it, Representative Stupak's bill addresses basically the disqualification for election. Do you have cases where there was no disqualification? Someone took office and then someone pursued their removal or their prosecution as a result of having violated the Hatch Act, but no one brought it up, but they are serving and——

Ms. GALINDO-MARRONE. We get a number of cases of what we call in the office "past candidacies," where, by the time the complaint is filed, the person has already won the office and is serving. And in those cases, for the most part, we typically—if we find that the person—we still have to investigate the case and make a determination. In those cases, we typically issue a warning letter. The penalty does not allow for a disciplinary action that someone be removed from their elective office. So what would still be at issue is their employment. And in some instances, the person is no longer employed.

But even then, with past candidacies, our focus is on trying to educate and advise the person for the future. We recognize how significant the penalty is, in terms of finding a Hatch Act violation. So you will find that with a majority of the cases, we issue warning letters. And only in those instances, I would say 99 percent of the candidacy cases, whether Federal or State and local, are those

cases where we actually warn the person that they were covered by the Hatch Act and gave them an opportunity to come into compliance with the law. And it is in those cases where we typically then seek disciplinary action if the person chose not to come into compliance with the law.

Mr. MARCHANT. And they could come into compliance either by resigning or——

Ms. GALINDO-MARRONE. Or withdrawing from the race, correct.

Mr. MARCHANT. So it is possible and probable that there are many office-holders in office today that there was no complaint filed and they are, in fact, in violation of the Hatch Act?

Ms. GALINDO-MARRONE. It is probable.

Mr. MARCHANT. And would probably receive warning letters if a complaint was filed?

Ms. GALINDO-MARRONE. Correct.

Mr. MARCHANT. Well, thank you very much.

Mr. DAVIS. Thank you very much, Mr. Marchant.

Mr. Stupak.

Mr. STUPAK. Well, thank you, Mr. Chairman. And thank you for your courtesy.

Let me just say that Ms. Marrone and others have—we actually did a video conference into my district because we had so many of these when Delta County, Schoolcraft County and Marquette County had to try to resolve this. And unfortunately, the Hatch Act, the way it is written, allows no leeway for these folks who are trying to enforce the law.

For instance, I mentioned Ishpeming, the chief of police there, he was given a warning letter that he was in violation because they had three highway traffic safety grants, a total of $594 for his whole department. He is the chief. He probably didn't put in the overtime, never got paid for it. But because his department received $594, he is disqualified underneath the Hatch Act to run for sheriff.

Do you have any suggestions how we would do it other than the 100,000? Should it be a percentage? If your position is funded 50 percent or more by Federal funds or something like that?

I mean, we had the Delta County where the person was an employee of public transportation, where every year they received Federal money for buses. He was disqualified because the public buses were paid for by the Federal Government.

Do you have any suggestions how we can do it other than the 100,000? I mean, it sounds like the law doesn't leave you any discretion. And these examples I bring out, to most of us it is not ignorance of the county board of commissioners when they appoint someone or when someone runs for sheriff, because their department of 10 people might have received $594 or $59 per member of the department, are suddenly disqualified because that $59 was Federal money. It doesn't make sense that you would apply the Hatch Act like that to people.

Any suggestions from our witnesses on how else to do it?

Mr. GUGLIELMI. Congressman, your concerns are absolutely valid. And, I mean, today we have prepared, you know, for this legislation. If it pleases the committee, I can confer with the special counsel and possibly come up with some technical recommenda-

tions to your office. You know, give us a chance to regroup and take a look at everything and see if we can help you out. But at this time, I don't.

Mr. STUPAK. OK.

Mr. MCPHIE. Let me make one observation. And it kind of makes this statute sort of unique in certain respects.

In terms of the penalties, the penalties are different for a Federal employee who violates the act than for a State employee who violates the act. Frankly, I want to know why; I don't know why. If a Federal employee violates the act, they can be removed or suspended without pay for 30 days. If a State employee violates the act, the only penalty by statute is removal, not suspension or anything of that type.

We have found no statement of the congressional intent on that difference. But if we have a case that involves a State employee and, in the end, by a preponderance of the evidence, it is proven that employee violated the statute, then the only penalty is removal. There is no discretion.

Mr. STUPAK. If I may, Mr. Chairman, you had indicated the enthusiasm of local offices, having half the land size of Michigan in my district. As I campaign in this election year, I look for the local sheriff race, I look for the local county commission race, because the enthusiasm and the voter turnout in these counties—and in Michigan, a county commission race is partisan, it is by our State constitution. That will increase the voter turnout. It is not the President. It is not the U.S. Senate. It is not even their most beloved Congressman. It is those local sheriff races that generate the enthusiasm at the local level, which increases the turnout.

And to have people disqualified because your department received $594 for three programs or averaged $200 per program is just insane. We must fix this. And it is not just Michigan; it is throughout this great Nation.

And thank you for your courtesy.

Mr. DAVIS. Well, let me come back—and according to Section 1501, chapter 15 of title 5, State or local officers or employees refer to those individuals whose principal employment is support in whole or in part by Federal loans or grants.

Could you explain what is meant by "in part?" In other words, what percentage of Federal funds does an agency have to receive in order for their employees to fall under the Hatch Act?

Ms. GALINDO-MARRONE. There is no precise percentage. But a couple of points, if I may.

First, just because a State or local agency receives Federal grants or loans does not mean that all the employees are covered by the Hatch Act. It is only those employees at that agency that have duties in connection with the federally funded program.

And in terms, I think part of your question, in whole or in part, so you may have a program that receives both State or county funds as well as Federal funds. So that would be a situation where you have a program that is funded with Federal grants in part. But only the individuals that have duties in connection with that program would be covered by the act, not all the employees in that agency.

Mr. DAVIS. Are either of you aware of any instances where individuals have actually gone to a circuit court after having been charged with violating the Hatch Act and win their case in the circuit court that there was no violation?

Ms. GALINDO-MARRONE. That I am aware of, in the last 10 years, I am not aware of any case like that.

And in terms of jurisdiction, in order to get into a Federal court, you first have to go through the Merit Systems Protection Board.

Mr. DAVIS. And so the Federal court is where they would have to—I am trying to recall a case where a person who worked for the State of Illinois decided to run for the State legislature, was forced to quit her job, actually was terminated I guess, or had to withdraw from the ballot, but who chose not to withdraw and actually ran. After the election was over, she sued, went to court, was restored to her position and received her back pay.

Ms. GALINDO-MARRONE. Several things. I believe that, possibly—but I don't want to misspeak, so it is something that, if you wish, we can go back to the office and brief this issue—prior to the 1974 amendments, I believe that employees could go directly to Federal district court, in terms of Hatch Act cases. So that is one point, but I would want to take a look at that.

And it is also possible that the challenge may not have been based on the Hatch Act. Or, for example, that the employer chose to remove the individual on Hatch Act grounds, and that probably the individual would have been able to successfully challenge, because it is only OSC that has exclusive authority to investigate and bring a disciplinary action complaint. It wouldn't be the employer that would be able to remove the individual on Hatch Act grounds. So there have been employees who have successfully challenged an employer action based on those grounds.

Mr. DAVIS. I would appreciate it very much if you could check into that for us, if you could.

Ms. GALINDO-MARRONE. Certainly.

Mr. DAVIS. And if you could also provide us with any Hatch Act statistics in terms of cases heard and the adjudication of those——

Ms. GALINDO-MARRONE. OK.

Mr. DAVIS [continuing]. I would appreciate it.

Ms. GALINDO-MARRONE. And just for point of clarification, Merit Systems Protection Board cases, or?

Mr. DAVIS. Actually both the Merit System Protection Board cases as well as cases that have actually gone to the Federal district court.

Ms. GALINDO-MARRONE. OK, very good.

Mr. DAVIS. Thank you very much.

Mr. Marchant, do you have any other questions?

If not, then thank you both. Thank you all.

We will now proceed to our third panel. And the witnesses for that panel: Mr. Jack Maskell, who is a legislative attorney with the American Law Division of the Library of Congress's Congressional Research Service. Mr. Maskell has been providing legal advice, analysis and assistance to Members of Congress, congressional committees and staff since 1973 on legislation and legislative matters, such as governmental ethics laws, conflict-of-interest laws, and the Federal Hatch Act.

We also have Ms. Sandra Bell, who is the Ohio Civil Service Employees Association's general counsel. OCSEA represents 36,000 State and other public workers and is an affiliate of the American Federation of State, County and Municipal Employees. Prior to assuming this position, Ms. Bell served in various elective positions within the Association, in addition to her role as general counsel. Ms. Bell also holds the position of director of information technology for OCSEA.

We want to thank both of you for coming and being with us. And if you would stand and raise your right hands to be sworn in.

[Witnesses sworn.]

Mr. DAVIS. The record will show that the witnesses answered in the affirmative.

If you would summarize your testimony for us in 5 minutes. And about this time of day, we don't worry too much about the lights, but the green light just means you have all the time. The yellow one indicates that you are down to 1 minute. And we generally try to end with the red one.

So thank you very much.

And we will begin with you, Mr. Maskell.

STATEMENTS OF JACK MASKELL, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE; AND SANDRA BELL, GENERAL COUNSEL, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11 AFL–CIO

STATEMENT OF JACK MASKELL

Mr. MASKELL. Thank you very much. I would like to thank the chairman and the subcommittee for the invitation to testify this afternoon.

I have submitted a more detailed written analysis to the subcommittee and will confine my comments here to just a few areas of that analysis.

The main point I would like to make this afternoon is that the Hatch Act, that many would agree has done its job in the past, is not carved in stone and it is not necessarily sacrosanct. It was a legislative response crafted by Congress to facts on the ground as they existed in 1939 and 1940; that is, specific abuses and allegations of political coercion and the doling out of Federal funds in work through the WPA.

The Hatch Act restrictions on both Federal employees as well as on State and local government employees have undergone substantial amendments, modifications and revisions over the years to accommodate the changing conditions and changing realities of Federal and public employment.

One of the earliest changes, in 1940, was to exempt Federal employees in certainly localities in which there live numerous Federal workers from the restrictions on running as an independent in a partisan election. This was done in the interest of allowing a large enough pool of civic-minded persons who would be interested in elected public service in these communities. This exception exists today for Federal employees in more than 70 localities in the

Washington, DC, area and beyond, including Fairfax County, VA, which now has more than a million residents.

In 1942, Congress again changed the law to enact a specific exemption to the Hatch Act for all government employees who were employed by a school or research institution. The exemption for school teachers and employees in State and local governments remains as part of the current law today. It was intended to assure that teachers have the right to freely discuss and be involved in political subjects and matters so that teachers might be examples for youth of participatory citizenship.

In 1974, major changes were made to the Hatch Act as it applied to State and local government employees, eliminating most of the Federal restrictions on off-duty, free-time politics. After these changes were made in the Federal laws, as the chairman pointed out earlier, several States then changed their positions on political activities of State employees, allowing for more voluntary, off-duty activities.

In 1983 and in 1987, surveys of State enforcement officials by committees of the House indicated that such changes in their States did not increase incidence of reported violations or abuses, but did, in fact, increase the participation in the political process and civic affairs by governmental employees.

In 1993, Hatch Act changes for Federal employees were made to reflect the realities and changes in the modern Federal work force and freed up most employees to engage in free-time political activities.

Remember, the Hatch Act restrictions as originally enacted in 1939 were seen, in many respects, as protections of government employees from coercion, from higher-level politically appointed supervisors to engage in political activities or to make contributions. With the advent of the modern, more independent merit-based civil service and the adoption of increased statutory and regulatory protections of Federal employees against improper coercion and retaliation, the need for a broad ban on all voluntary activities in politics as a means to protect employees was seen as less necessary. The conditions of Federal employment have changed dramatically since the first restrictions on political activities were passed.

As one example, the percentage of merit system civil service employees grew from 10 percent of the Federal work force at the time of the passage of the Pendleton Civil Service Act in 1883 to 32 percent of the Federal work force at the time of the passage of the Hatch Act in 1939 to the more recent figure of more than 80 percent of all Federal workers being under merit system. The 1993 Hatch Act amendments addressed these new realities.

With regard to running for office, in the legislation at hand it might be argued that in many ways the Hatch Act is more restrictive for State and local employees than for Federal employees regarding candidacy. Although both sets of employees may run in nonpartisan elections where no candidates have a major party label, the local community exemption for Federal employees allowing them to run as independents and even partisan elections in certain communities applies only to Federal workers. There is no similar exemption for State and local government employees in their local communities.

Second, Federal employees who work only part time or intermittently are covered by the Hatch Act only when on duty and therefore can be partisan candidates in a partisan election off of duty time. State and local employees, however, have no such part-time exemption and are covered as long as their part-time government position is their, "principal employment." If Congress finds that the pool of eligible civic minded persons to run for local office in rural and smaller communities has been adversely affected because of the extended reach of Hatch Act and the increased pervasiveness of Federal funding of local activities, then Congress may certainly address the issue legislatively as it has done in the past.

It should be noted that even if the Federal Hatch Act is changed for State and local employees such employees will still be subject to State laws, local ordinances, State and local personnel regulations and executive orders regarding permissible outside political activities and workplace conduct.

The Supreme Court has found that the Federal Hatch Act does not preempt and supersede State and local laws and ordinances on State and local employee conduct. The legislation, H.R. 4272, providing exemption for all employees and communities in local governmental units with a population of under 100,000 would allow them to run for local offices and partisan elections.

If you find that a change in law is called for but fear that the legislation might create too broad an exemption, it may be narrowed in several ways. I will give you just a few suggestions. Some suggestions might include limiting the exemption to those employees who do not actually administer, disburse or distribute Federal funds. Another would be to require an employee to run as an independent as opposed to representing a political party in a partisan election similar to the exemption for Federal employees in exempted localities.

Another position may be enacted expressly addressing workplace politicking by expressly prohibiting in Federal law such conduct while on the job, although I have to tell you most States prohibit that already in their State codes.

And finally, the issue of soliciting political contributions may be addressed to allow such employees to solicit from the general public so their candidacies might be viable but prohibiting noncoercive, knowing solicitation of colleagues, which is also prohibited in a lot of State codes as well.

Thank you very much.

[The prepared statement of Mr. Maskell follows:]

Memorandum September 8, 2008

SUBJECT: **Background and Analysis of the Application of the Federal Hatch Act Restrictions to State and Local Government Employees, and H.R. 4272, 110th Congress**

FROM: Jack Maskell
Legislative Attorney
American Law Division

This memorandum is intended to examine the background and applicability of the federal law commonly known as the "Hatch Act," its application to state and local government employees, the restrictions on such employees running as candidates in local elections, and legislation intended to address the issue of the lack of opportunity for candidacies for local offices by covered state and local government employees.

Background

The federal law governing political activities by *federal* employees, commonly known as the "Hatch Act," was originally enacted in 1939,[1] and had, until February of 1994, substantially restricted even voluntary partisan political activities of federal employees on their own time. The provisions of the Hatch Act were, soon after enactment, expanded and amended in 1940 to impose statutory restrictions on certain *state and local* governmental employees whose principal employment was in connection with a federally funded activity.[2]

The Hatch Act provisions for federal employees, as well as the provisions applicable to state and local government employees, have undergone significant changes over the years. The provisions of the Hatch Act were amended in 1942, for example, to exempt teachers and employees of educational institutions from the restrictions on federal employees, as well as from the federal restrictions applicable to state and local employees.[3] The limitations and regulations on state and local employees generally were significantly relaxed in 1974 to remove the federal restriction on all covered state and local employees voluntarily

[1] P.L. 76-252; 53 Stat. 1147, August 2, 1939. For the current Hatch Act as it applies to federal employees, see 5 U.S.C. §§ 7321- 7326.

[2] P.L. 76-753, 76th Cong., Section 4, 54 Stat. 767 - 770, July 19, 1940.

[3] P.L. 77-754, , 77th Cong., 56 Stat. 986, October 24, 1942.

participating in partisan political activities on their own free time (other than being a candidate in a partisan election).[4] Most *federal* employees under the Hatch Act, like their state and local counterparts, are now, under 1993 amendments to the Hatch Act, generally free to engage in voluntary partisan political activities on their own free time, away from the federal workplace.[5] There are still two major restrictions under the Hatch Act on outside political activities of federal employees, one on soliciting political contributions from any person (other than a contribution to a multi-candidate PAC from a fellow labor or employee organization member who is not a subordinate), and the other on running as a candidate in partisan election.[6]

Current Hatch Act Restrictions on State and Local Employees

Applicability of Federal Hatch Act to State and Local Employees. Certain provisions of the current federal Hatch Act apply to some state and local government employees "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States."[7] The federal Hatch Act restrictions thus apply to an individual (1) whose principal employment is as a state or local public officer or employee, and (2) who in the course of that employment has functions or performs duties that are "in connection with" a federally funded activity. Such determinations about the employee's duties are made without regard to measuring and comparing those functions of the public employee's job which are *connected* to a federally funded activity with those that are connected to non-federally funded activities.[8] The agencies and courts analyzing the Hatch Act provisions have thus employed what they have termed an "analytical interpretation" of the "principal employment" requirement, as opposed to what has been called the "scale" or weighted theory:

> Under it, we do not divide and weigh the things which an employee does. We merely analyze the position or job to determine, first - whether it is his "principal" one, and

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[4] P.L. 93-443, 88 Stat. 1263. State and local employees covered by the federal Hatch Act were, and still remain, under the prohibitions on using their official authority to influence an election, and on coercing or attempting to coerce anyone into making political contributions. 5 U.S.C. § 1502. Additionally, state and local employees remain subject to any applicable state and local laws, ordinances, or regulations on political activities of public employees.

[5] P.L. 103-94; 107 Stat. 1001 (October 6, 1993), see 5 U.S.C. §§ 7321 *et seq.*

[6] 5 U.S.C. § 7323(a)(2) and (3).

[7] *See* definitions at 5 U.S.C. § 1501(4). Individuals employed by education or research institutes are exempt from restrictions (5 U.S.C. § 1501(4)(B)), and the restrictions on candidacies in partisan elections do not apply to those who are state or local government employees by virtue of their being *elected* officeholders, such as the Governor or Lieutenant Governor, the mayor of a city, an elected head of an executive department, or any individual holding elective office. 5 U.S.C. § 1502(c).

[8] *In the Matter of Charles M. Slaymaker,* CSC No. S-31-43, 2 P.A.R. 56 (1943); *In the Matter of William T. Hutchins*, CSC No. S-114-44, 2 P.A.R. 160 (1944); *In the Matter of William Knies and the States of Illinois*, CSC No. S-244-58, 2 P.A.R. 578 (1958), affirmed, *Knies v. United States Civil Service Commission,* Summary Judgment, S.D. Ill. No. 2557, January 8, 1959 (Dismissed 7th Cir. July 7, 1960); *In the Matter of Carmel Wolfe and the State of New York,* CSC No. S-247-62, 2 P.A.R. 664 (1962); *In the Matter of Nello A. Tineri and the Department of City Planning and Urban Development of the City of Monessen, Pennsylvania,* CSC No. S-283-69, 2 P.A.R. 825 (1969).

> second - whether it involves (as a normal and foreseeable incident thereof) performance of duties in connection with a Federally financed activity....[9]

As explained further by the United States Office of Special Counsel [OSC], the federal agency responsible for Hatch Act enforcement, the functions of the state or local employee to be covered under the Hatch Act need not involve the administration or distribu+tion of, nor involve any dominion or control over federal funds, but rather need only be "in connection with" an activity that is in whole or in part funded with federal monies:

> Employees are subject to the Act if, as a normal and foreseeable incident of their principal employment, they perform duties in connection with the federally financed activities. *In re Hutchins*, 2 P.A.R. 160, 164 (1944); *Special Counsel v. Gallagher*, 44 M.S.P.R. 57 (1990). Coverage is not dependent on the source of an employee's salary, nor is it dependent upon whether the employee actually administers the funds or has policy duties with respect to them. *Special Counsel v. Williams,* 56 M.S.P.R. 277, 283-84 (1993), aff'd, *Williams v. M.S.P.B.*, 55 F.3d 917 (4th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (unreported decision).[10]

Federal Hatch Act Prohibitions on State and Local Employees. The three substantive restrictions of the federal Hatch Act applicable to covered state and local government employees:

- bar covered state and local government employees from using their official authority to influence an election;
- prohibit such employees from coercing another state or local employee to engage in politics or to make a contribution; and
- prohibit such covered state and local governmental employees from being a candidate in any partisan election.[11]

Candidacies to Office. Covered employees of state or local governmental units may not be candidates in a "partisan" election.[12] Although candidacies in a "non-partisan" election are expressly permitted, the election itself must be "non-partisan" — that is, *no* candidate in the election may have an affiliation with or represent a major political party (whose candidates for presidential elector received votes in the last election).[13] The statute would, therefore, work to continue to bar even an "independent" candidacy by a covered state or local employee in an otherwise "partisan" election.

Holding Elective Public Office. The specific restrictions of the Hatch Act, which prohibit a covered state or local governmental employee from being a *candidate* in a partisan election, do not prohibit such an employee form *holding* an outside, elective office. A person

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[9] *Tineri, supra* at 828-829 (1969), quoting *Slaymaker, supra* (1943); *note Anderson v. United States Civil Service Commission,* 119 F. Supp. 567, 572-573 (D.Mont. 1954).

[10] U.S. Office of Special Counsel, Letter Opinion, August 14, 2006. Available on OSC website, at http://www.osc.gov/ha_state.htm.

[11] 5 U.S.C. §§ 1501, 1502.

[12] 5 U.S.C. § 1502(a)(3).

[13] 5 U.S.C. § 1503.

holding an elective public office may therefore be appointed to a state or local government job and continue to hold the outside office under the Hatch Act, or a current state or local employee may be appointed to an otherwise elective public office to fill a term. However, such covered state or local employee may not be able to run for re-election for that outside public office if the election is a "partisan" election. As explained by OSC:

> The law that prohibits candidacy for elective office does not prohibit holding office. Therefore, if an employee holds elective office when appointed to a state or local position, the employee may continue to serve. However, such an employee may not be a candidate for reelection in a partisan election. Likewise, an employee may accept appointment to fill a vacancy in an elective public office while concurrently serving in a covered position. Such employee should ascertain from his or her employing agency if acceptance of such an appointment constitutes a conflict of interest.[14]

State and local employees, in a similar manner as federal employees, may also be limited in some outside office holding by traditional "conflict of interest" principles, depending on the nature of their public employment, the duties of the office in question, any potential incompatibilities or conflicts between the two, and any applicable state or local regulatory or statutory conflict of interest provisions.

State and Local Provisions, Ordinances and Laws. The federal Hatch Act might not be the only law that restricts or limits the outside political activity of a state or local employee. In addition to the federal law, state provisions, as well as certain municipal laws and ordinances, including regulations from executive departments or executive orders from a governor, may address the subject of permissible partisan political activities of state or local government employees.[15]

Provisions of state or local law regarding political activities of public employees operate concurrently with the federal restrictions, and if the state or local provisions are more restrictive concerning permissible activities than the federal law, such state provisions would be operative as to the state and local employees. There is in the Constitution a preemption provision whereby federal laws made pursuant to constitutional authority on a subject will preempt and supersede conflicting state and local provisions (note Article VI, clause 2). The federal Hatch Act with respect to political activities of state and local employees was found, however, by the Supreme Court not to be an attempt by Congress to legislate specific rules for state and local employees, nor to regulate their political activities, but rather was a measure to deal with the administration of federal allotments to the states. In upholding the provisions of the federal Hatch Act relative to state and local employees from a constitutional challenge based on the 10th Amendment, the Supreme Court stated:

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[14] U.S. Office of Special Counsel, *Political Activity and the State and Local Employee,* at 7 (December 2005).

[15] Note CRS Rpt. No. 87-904, "Compilation of State Laws Governing Political Activities of Public Employees," November 13, 1987; see also 51 ALR4th 702 "Validity, Construction, and Effect of State Statutes Restricting Political Activities of Public Officers or Employees" (1987).

> While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.[16]

When the federal Hatch Act provisions dealing with the permissible political activities of state and local government employees were last amended in 1974[17] to allow a greater freedom of political participation (as far as the *federal* restrictions on state employees were concerned), Congress expressed its clear intent that such provisions would not preempt nor supersede more restrictive provisions of state or local law with regard to their employees. The conference report on the measure clearly stated:

> It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments to title 5, United States Code, amended by this legislation.[18]

When a state or local provision prohibits certain conduct of its employees, therefore, that law will still be operative despite the fact that the employee was not expressly prohibited from such conduct by a provision of a federal law on the subject.[19] However, even if permitted (or not restricted) by a state provision regarding political activities by state personnel, the federal Hatch Act provisions would still restrict a covered employee from activity under the federal authority over the administration of federal allotments.[20] In the application of the federal Hatch Act provision, state laws and codes may be employed as the most appropriate measure to determine certain questions under the law, such as, for example, which agencies are considered to be in the "executive branch" of that state or local government.[21]

Significant Changes to and Exemptions from the Hatch Act

1974 Amendments to Restrictions on State and Local Employees. As noted above, major changes to the Hatch Act as it applied to state and local government employees were made in 1974.[22] These provisions, enacted as part of general federal election reforms, eliminated most all of the federal restrictions on off-duty, free-time political activities for state and local employees, other than the restriction on candidacy to elective office in a partisan election. Additionally, the 1974 amendments left in place restrictions on using one's official influence to affect an election, and the prohibition against coercion of employees. In reviewing changes and reforms to the Hatch Act, committees in the House of Representatives examined state legislative activities in this area, and found that after changes

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[16] *Oklahoma v. United States Civil Service Commission,* 330 U.S. 127, 143 (1947).

[17] P.L. 93-443, Section 401, 88 Stat. 1290, October 15, 1974.

[18] S. Conf. Rpt. No. 93-1273, 93rd Cong., 2d Sess. (1974), reprinted in *1974 U.S. Code Cong. & Ad. News* 5587, 5618, 5669.

[19] *Reeder v. Kansas City Board of Police Commissioners,* 733 F.2d 543, 545-546 (8th Cir. 1984).

[20] *Oklahoma v. United States Civil Service Commission, supra; State of Connecticut Department of Human Resources v. United States Merit Systems Protection Board,* 718 F. Supp. 125 (D.Conn. 1989).

[21] See *Special Counsel v. Bissell,* 61 M.S.P.R. 637 (M.S.P.B. 1994).

[22] P.L. 93-443, Section 401, 88 Stat. 1290, October 15, 1974.

were made in the federal law, several states then changed their provisions on political activities of state employees to allow for more voluntary, off-duty activities.[23] Surveys by committees of the House in 1983 and in 1987 of state enforcement officials indicated that such legislative changes and reforms did not increase incidents of reported violations or of abuses, such as coercion, and did in fact increase the participation in the political process and in civic affairs by governmental employees.[24]

Hatch Act Amendments of 1993. In 1993, the provisions of Hatch Act applicable to federal executive branch employees were significantly amended by the "Hatch Act Amendments of 1993" to allow most federal employees to engage in a wide range of voluntary, partisan political activities on their own free time, away from their federal jobs and off of any federal premises.[25] The Hatch Act as originally enacted in 1939, as well as the original civil service rules and restrictions on political activities on which the law was based, were seen in some respects as protections of federal employees from coercion from higher level, politically-appointed supervisors to engage in political activities against their will;[26] as well as an effort by Congress and the Executive to assure a non-partisan and evenhanded administration of federal laws and programs.[27] With the advent of the modern, more independent and merit-based civil service,[28] and the adoption of increased statutory and regulatory protections of federal employees against improper coercion and retaliation,[29] the need for a broad ban on all *voluntary*, outside activities in politics as a means to *protect* employees was seen as less necessary, and as more restrictive of the rights of private expression of millions of citizens than was needed to accomplish the goals of the Hatch

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[23] H.R. Rpt. No. 101-27, 101st Cong., 1st Sess. 12 (1989).

[24] H.R. Rpt. No. 101-27, *supra*; Committee Print No. 98-9, 98th Cong., 1st Sess. 7-8 (1983).

[25] P.L. 103-94, October 6, 1993; 5 U.S.C. §§ 7321 *et seq.* Some employees of designated agencies and departments are still restricted in participating in even voluntary, off duty political activities. 5 U.S.C. § 7323(b).

[26] S. Rpt No. 1, 76th Congress, 1st Session (1939). The investigative hearings and report focused on the abuses of the merit system and use of public work relief funds (W.P.A.) to coerce political activities, loyalty and contributions from workers. Note discussions in Bolton, *The Hatch Act, A Civil Libertarian Defense*, American Enterprise Institute, at 2-3, 9-16 (1976), and H.R. Rpt. 103-16, 103rd Congress, 1st Session, 7-13 (1993).

[27] *United Public Workers, C.I.O. v. Mitchell,* 330 U.S. 75, 94-103 (1947); and *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 413 U.S. 548, 564-567 (1973), upholding Hatch Act against First Amendment challenge.

[28] The percentage of merit system civil service employees grew from 10% of the federal workforce at the time of the passage of the Pendleton Civil Service Act in 1883, to 32 % of the federal workforce at the time of the passage of the Hatch Act in 1939, to the more recent figure of more than 80% of all federal workers being under a merit system. See *2006 Federal Personnel Guide,* LRP Publications, at 14 (2005); Comm. Print 94-29, 94th Congress, 2d Session, "History of Civil Service Merit Systems of the United States and Selected Foreign Countries," at 8 (1976).

[29] See, for example, 5 U.S.C. §§ 2301-2302, merit system principles and prohibited personnel practices, including now whistle blowing protection, added by the Civil Service Reform Act of 1978; 5 U.S.C. §§ 1201 *et seq.* and 1211 *et seq.*, creating Merit Systems Protection Board and Office of Special Counsel. Note also the emergence of employee protections through recognized bargaining representatives and statutorily required grievance procedures. 5 U.S.C.§§ 7111 *et seq.*, and 7121 *et seq.*

Act.[30] The 1993 Hatch Act Amendments thus removed many of the most restrictive limitations in federal law on employees' personal, off-duty voluntary activity, speech and expression, while at the same time provided more express statutory prohibitions on workplace politicking and prohibitions on political coercion.[31]

Exemption for Teachers and School Employees. In 1942 Congress enacted a specific exemption to the Hatch Act for employees of the government who were employed by a school or research institution. This included the teachers employed by the federal government and the District of Columbia in the federal employee portion of the Hatch Act, and teachers employed by systems in state or local governmental entities or territories where federal funds or programs were involved, under the state or local employee parts of the Hatch Act.[32] The exemption for school teachers and school employees remains as part of the current law.

The primary purposes of the specific exemption stated in the legislative history of the amendment included the need to explicitly exempt teachers because of the mistaken belief and earlier assurances that teachers were not covered under the provisions of the original Hatch Act.[33] Additionally, the reports on the 1942 amendment noted that such exemption was desirable because there had been no evidence of those in the teaching profession engaging in "pernicious" political activities (at which the Hatch Act was explicitly directed), to assure that teachers had the right to freely discuss and be involved in political subjects and matters, to allow teachers to be examples for youth of participatory citizenship, and to assure a vibrant and effective discussion of public issues concerning schools in the political arena by those closely connected to and knowledgeable about the schools.[34]

Exception for Political Activities in Certain Municipalities and Localities. An exemption to allow certain government employees to be candidates even in a partisan election in certain localities is not unknown or unusual under the federal Hatch Act. Under current federal law, and as part of the Hatch Act since 1940, federal employees are allowed to run as independents in even "partisan" elections (and had been allowed to engage in outside partisan activities even when they had been generally barred prior to 1994) in certain municipalities and localities because of the number of federal employees in such

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[30] H.R. Rpt. 103-16, *supra* at 5-15 (1993).

[31] See now 5 U.S.C. § 7324; note also 18 U.S.C. § 610

[32] P.L. 77-754, , 77th Cong., 56 Stat. 986, October 24, 1942. The exemption also covered teachers and employees of educational or research institutions supported by a "recognized religious, philanthropic, or cultural organization."

[33] Committee reports stated that language providing an explicit exemption for teachers had not been adopted earlier, in 1940, "principally because of the expressed opinion of Senator Hatch, and others, that the provisions of the Hatch Act did not apply to teachers. After the enactment of the Act the attorneys general of Ohio and Minnesota ruled that teachers in land-grant colleges and in schools being assisted under [federal programs] were subject to the Act." S. Rpt. No. 1348, 77th Cong., 2d Sess. at 1 (1942); H.R. Rpt. No. 2296, 77th Cong., 2d Sess. at 1 (1942).

[34] S. Rpt. No. 1348, *supra* at 2-3; H.R. Rpt. No. 2296, *supra* at 2-3. The caption of the original Hatch Act was "An Act to prevent pernicious political activities." 53 Stat. 1147, August 2, 1939.

jurisdictions.[35] More than 70 localities around the Washington, D.C. area, as well as localities in several other states, are now listed by the Office of Personnel Management as exempt localities.[36] In cases where federal employees are allowed to run, the regulations of the Office of Personnel Management implementing the Hatch Act provide that actual *service* in a particular partisan public office would be analyzed under a general "conflict of interest" standard, and thus would be allowed if such service will not "result in neglect of, or interference with, the performance of the duties of the employee or create a conflict, or an apparent conflict, of interest."[37]

Legislation

The legislation under consideration, H.R. 4272, 110th Congress, would exempt employees in local communities having a population under 100,000, and would allow such employees to run for local office. The stated purpose and impact of the legislation is directed at smaller communities where, because of the number of local and state employees now coming within the restrictions of the federal Hatch Act, the pool of civic-minded persons who are available to run for local office, such as town council or local school board, has been diminished. The federal Hatch Act, it should be remembered, applies to state and local employees even when such employees do not manage, administer or disburse federal funds, and even when the salary of such state or local employee is not paid for in part or in whole by federal funds. Rather, as noted above, the Hatch Act provisions apply merely when in the normal course of the employee's principal employment that employee will perform duties that are "in connection with" federally funded activities.[38] It would thus be logical to conclude that many more state and local employees are now touched by the federal Hatch Act provisions than ever considered in the original coverage in 1940, given the ever-increasing federal budget,[39] the significant rise in disbursal of federal funds to states and localities, and federal funding involvement in an increasing range of activities concerning, for example, (as set out by the Office of Special Counsel) "public health, public welfare, housing, urban renewal and area redevelopment, employment security, labor and industry training, public works, conservation, agriculture, civil defense, transportation, anti-poverty, and law enforcement programs."[40]

In many ways the current Hatch Act provisions are more restrictive for *state and local* employees than such provisions are for *federal* employees. In the first instance, the exemption to allow federal employees to run for office as an independent in an otherwise partisan election in those communities having numerous federal government employees, applies only to federal employees. There is no similar exemption for state or local employees

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[35] 5 U.S.C. § 7325. See originally P.L. 76-753, Section 4 (adding Section 16 to the original Hatch Act), 54 Stat. 771, July 19, 1940.

[36] 5 C.F.R. § 733.107, listing 47 entities in Maryland, 15 in Virginia, and 12 in several other states.

[37] 5 C.F.R. § 733.102(c).

[38] 5 U.S.C. § 1501(4).

[39] For example, total federal budget outlays for 1940 were $9,468,000,000 (comparable to $108,800,000,000 in constant FY 2000 dollars), as compared to total federal budget outlays for 2007 estimated to be $2,784,267,000,000. Office of Management and Budget, "Historical Tables, Budget of the U.S. Government," at 21-22, 25 (Fiscal Year 2008).

[40] U.S. Office of Special Counsel, "Political Activity and the State and Local Employee," at 3 (2005).

in communities or areas where the number of covered state and local employees may severely limit the pool of qualified and interested candidates for local offices. Additionally, *federal* employees who work only part-time or intermittently are covered by the Hatch Act only when in "on-duty" status, and are allowed to run for office even in a partisan election when off-duty.[41] However, there is no similar exemption for part-time or intermittent state or local employees covered under the federal provisions, and they apply as long as such position is the employee's principal employment.[42]

The legislation addresses permissible candidacies, however, in a different manner than the exemptions for federal employees. Unlike the federal exemption for certain communities, state and local employees under H.R. 4272 would appear to be permitted to run as partisan candidates in a partisan election for local office, while federal employees in exempted localities must now run as independents in such elections. An additional consideration in the proposed legislation is that there is no explicit prohibition for "on duty" politicking as was expressly adopted in the liberalization of the Hatch Act for federal employees in 1993. Although it is most likely that the state civil service systems have general rules about workplace conduct, some may see it preferable to have a specific provision that could be federally enforced through the federal government's spending authority. One other area of consideration would be that federal employees are now generally prohibited from directly soliciting financial political contributions from other federal employees, except in certain circumstances, and that such federal restriction on federal employees would apply to even non-coercive solicitations.[43] The existing restriction in the federal Hatch Act for state and local employees is only on coercing or "advising" another state or local employee to make a political contribution,[44] and might not cover the much more subtle activity of merely soliciting one's colleagues for contributions to one's own campaign. State and local employees who are permitted to be candidates would likely have to be able to solicit contributions from the general public, however (as are federal employees when they are permitted to be candidates), if their candidacies are to be at all viable.

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[41] 5 C.F.R. § 734.601. "*Example*: An employee appointed to a special commission or task force who does not have a regular tour of duty may run as a partisan political candidate, but may actively campaign only when he or she is not on duty."

[42] "Political Activity and the State and Local Employee," *supra* at 5.

[43] See 5 U.S.C. § 7323(a)(2)(A) - (C).

[44] 5 U.S.C. § 1502(a)(2).

Mr. DAVIS. Thank you very much, and we will proceed to Ms. Bell.

STATEMENT OF SANDRA BELL

Ms. BELL. Good afternoon, Chairman Davis, Member Marchant. My name is Sandra Bell. I would like to thank you for this opportunity to address the subcommittee. A written copy of my testimony has been submitted to the committee, and I request that it be admitted into the record.

Speaking on behalf of AFSCME and OCSEA, we submit that the Hatch Act is antiquated. We applaud Representative Bart Stupak for introducing H.R. 4272. H.R. 4272 will begin to eliminate a prohibition that has unfairly denied public employees the rights and privileges of full citizenship for 69 years. While we fully support the bill, we would like to see its scope broadened.

The proposed population threshold is too low to provide relief to the vast majority of State and local government employees, including those in my home State of Ohio. Although Ohio is governed by its own little Hatch Act, the injustices suffered in Ohio are comparable to those across the country.

The Hatch Act, as interpreted by the individual agencies in Ohio, has a chilling effect upon the ability of the ordinary citizen to engage in the political process. For example, Charlie Bakle, a highway maintenance worker for the Ohio Department of Transportation received a 10-day suspension for talking politics at work. Debbie King, an enthusiastic worker for the Department of Job and Family Services, received a 30-day unpaid suspension because she volunteered to gather signatures for a candidate on her own time. Had Charlie or Debbie been employees in agencies which did not receive $1 of Federal funds, they would have been allowed to engage in the political process and maintain their job security.

AFSCME and OCSEA are actively working to repeal Hatch Act prohibitions in order to give the Charlies and Debbies of the country a chance to fully participate in the democratic process regardless of where they work. The prohibition on parties and political activity has outlived its usefulness and should be repealed in its entirety.

Unlike in 1939, most States' laws now require disclosure of campaign contributions and expenditures. Safeguards are in place to protect the public from corruption and will remain in place if the prohibitions are lifted. However, if a repeal is not achievable currently, incremental reform should be considered and we urge be included in H.R. 4272, and we do have some suggestions.

First, we suggest that the Hatch Act could be amended to limit the act's scope to those employees with discretionary authority over use of Federal funds or associated policymaking. The prohibition currently applies, with some narrow exceptions, to, and I quote, any individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency and who exercises some function in connection to that activity. We think this definition is too broad and too far reaching.

Second, a threshold could be set for the amount of Federal funding that would trigger the Hatch Act. As it stands, the Hatch Act applies to all State or local government employees employed by an activity which is financed in whole or in part by Federal loans or grants. A reasonable amendment could trigger the prohibition only where 25 percent or more of an employee agency's budget was composed of Federal funds.

Third, the Hatch Act currently applies to employees on an unpaid leave of absence. In order to run for partisan political office, most States or local government employees must resign. Forced resignation is harsh and unreasonable. While on unpaid leave, an employee would not have access to nor receive Federal funds. Little harm seems to exist if such an employee is permitted to run for office. For too long State and local employees have been treated like second class citizens by virtue of Hatch Act prohibitions. Reform is long overdue. AFSCME and OCSEA believe that the prohibition against partisan candidacy should be repealed in its entirety. We strongly support H.R. 4272, but ask that its population threshold be increased at a minimum to maximize impact and to provide some additional reforms.

I thank the subcommittee again for the opportunity to discuss the Hatch Act and will be happy to answer any questions.

[The prepared statement of Ms. Bell follows:]

Testimony of Sandra Bell, General Counsel of the
Ohio Civil Service Employees Association (OCSEA)
before the
Subcommittee on Federal Workforce, Postal Service, and the District of Columbia
on
H.R. 4272, an Act, "To amend chapter 15 of title 5, United States Code, to provide for an additional, limited exception to the provision prohibiting a State or local officer or employee from being a candidate for elective office."
September 8, 2008

Mr. Chairman and members of the Subcommittee, my name is Sandra Bell. I am the General Counsel of the Ohio Civil Service Employees Association (OCSEA). OCSEA represents approximately 36,000 public employees spanning all state agencies, as well as every county of Ohio. OCSEA is affiliated with the 1.4 million-member American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO.

AFSCME and OCSEA strongly support reforming the antiquated Hatch Act. We applaud Representative Bart Stupak for introducing H.R. 4272, an Act "to amend chapter 15 of Title 5, United States Code, to provide for an additional limited exception to the provision prohibiting a State or local officer or employee from being a candidate for elective office."

The Hatch Act was originally created in 1939 to ensure political neutrality by prohibiting federal employees from:

- Soliciting, accepting or receiving a political contribution in a government building;
- Running for partisan office; or
- Engaging in political activity while on duty, in a government building, in uniform or in a government vehicle.

The prohibition against running for office, codified at 5 U.S.C. §§ 1502(a)(3) and 1503, reaches beyond what is necessary today to prevent corruption in state and local governments or misuse of federal funds, and we believe, is ripe for change.

While AFSCME and OCSEA fully support H.R. 4272, we would like to see its scope broadened. The population threshold is too low to provide relief to the vast majority of state and local government employees, including those in my home state of Ohio.

Ohio is one of nine states governed by its own "little" Hatch Act, modeled after the federal statute. The state act creates two types of public employees, classified and unclassified. "Classified employees" include state public employees and those who work in cities and counties, including firefighters, police officers, teachers and many other workers. "Unclassified employees" include agency directors, deputy directors, division chiefs, and a host of others that "serve at the pleasure of the appointing authority." Unclassified employees may serve on state central committees, run for party leadership positions and may seek for full-time elected office with prior approval from the Governor. However, classified employees are treated like felons and are prohibited from running for office.

Political activity for classified, public employees is governed by Ohio Administrative Code §§123:1-46-02. Under state law, a classified public employee may not make a telephone call on behalf of a candidate, go door to door for or with a candidate, circulate a partisan nominating petition, serve on a state committee or hold office in any political party structure on their own time. A classified public employee may vote, express a political opinion, and wear a button or a put a sign in their yard, but anything beyond this is prohibited.

Consequently, the Hatch Act has a chilling effect upon the ability of ordinary citizens to engage in the political process. Charlie Bakle, for example, is a highway maintenance worker for the Ohio Department of Transportation (ODOT). Charlie loves the political process as much as he loves his neighbors. His goal in life is to serve the public at work and in his free time. Even though Charlie understands the political process and would love to run for office, he is prohibited from doing so by virtue of his career choice. Charlie received a 10-day suspension for talking politics at ODOT garages and engaging in water cooler conversations.

Debbie King, an enthusiastic female state worker, is another example. Debbie was so impressed with a newcomer running for political office that she volunteered to gather signatures for her on her own time. This enthusiastic effort resulted in a 30-day unpaid suspension, all because Debbie was a market analyst for the Department of Job & Family Services.

Had Charlie or Debbie not been state employees, they would have been allowed to engage in the political process and maintain their job security. OCSEA is actively working to repeal the state Hatch Act and continually fights to give employees, like Charlie and Debbie, a chance to fully participate in the democratic process, and we believe it is unfair that our members are denied the opportunity to participate in many election activities, including volunteering in "get out the vote" and campaign programs simply because of where they work.

Additional Reforms are Necessary

Another election cannot pass without reform. The prohibition of partisan candidacies for elected office by state and local government employees should be repealed in its entirety. This prohibition has outlived its usefulness. Unlike the era when the Hatch Act became law, most states' laws – like Federal law – now require disclosure of campaign contributions and expenditures. Today, the public may monitor campaign contributions and see how those funds are being utilized. Safeguards are in place to protect the public from corruption and will remain in place if the prohibition is lifted. If repeal is not achievable, incremental reforms are available and may be included in H.R. 4272.

Limit Prohibition to Employees with Discretionary Authority

The Hatch Act could be amended to limit prohibition on partisan candidacies to those state and local employees with discretionary authority over use of federal funds or with policy making discretion. No limitation is currently in place. Instead, the prohibition applies, with some narrow exceptions, to "any individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency" and who exercises some function in connection with that

activity. See 5 U.S.C. 1501(4).[1] The less policy making or spending discretion a public employee has, the less opportunity there is for corruption or misuse of funds.

By allowing unclassified employees to participate, the Hatch Act actually increases the possibility that employees with the greatest discretionary authority are the ones most likely to engage in the political process, a consequence almost opposite of its stated intentions.

Set a Federal Funding Threshold Amount

Secondly, a threshold could be set for the amount of federal funding that would trigger a Hatch Act prohibition. As it now stands, the Act simply applies to all state or local government employees whose "principal employment is in connection with an activity which is financed *in whole or in part* by loans or grants made by the United States or a Federal agency."[2] Thus, state and local employees whose agencies receive even a minimal amount of federal funds are restricted from running for partisan office, as are those whose jobs are financed by an insubstantial amount of federal funds. We believe setting a threshold amount would be a reasonable fix. For instance, an amendment could be added to provide that only those state and local employees who are employed by agencies whose total budgets include at least 25% federal funds would be prohibited from running for partisan public offices.

Permit Employees To Run For Office While on Unpaid Leave

A third problem with this provision of law is that the prohibition applies even when a state or local employee takes an unpaid leave of absence from his or her government employment. In order to run for partisan political office, the employee must resign from government employment. *See State of Minnesota Dept. of Jobs and Training v. MSPB,* 875 F.2d 179, 183 (8th Cir., 1989) (*en banc*). If a state or local government employee is on unpaid leave he or she will not have access to nor receive federal funds while campaigning. Little harm seems to exist if such an employee is permitted to run for office while on unpaid leave.

Conclusion

Under present law, public employees are treated like second class citizens who are being denied the rights and privileges of full citizenship in this nation. This is grossly unfair and undemocratic. Consequently, reform of the Hatch Act is long overdue. We believe that the prohibition against partisan candidacy should be repealed in its entirety. AFSCME and OCSEA strongly urge Congress to act now and utilize its authority to correct this injustice.

For the foregoing reasons, we strongly support H.R. 4272. As outlined above, we urge that the population threshold in H.R. 4272 be increased and additional reforms be included.

I thank the Subcommittee again for the opportunity to discuss Hatch Act reform and will be happy to answer any questions.

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[1] The narrow exceptions to the broad sweep of the prohibition include individuals "employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization" and non-civil-service state and local executive officers and elected officials. *See* 5 U.S.C. §§ 1501(4)(b) and 1502(3)(c).

Mr. DAVIS. Thank you very much, and I believe your testimony triggered my memory, and I believe it was an AFSCME union employee that——

Ms. BELL. I wouldn't doubt that.

Mr. DAVIS [continuing]. That brought the suit that I recall. But thank you very much for your testimony.

Mr. Maskell, let me ask you, H.R. 4272 would allow State and local employees in communities having a population under 100,000 to run for local partisan office. What would be the effect of allowing State and local employees to run for local office in a partisan election today since the original intent of the Hatch Act, as I understand it, was to prevent corruption in local and State governments on misuse of Federal funds, which would be considered pretty much outdated today, I would think?

Mr. MASKELL. I agree with the testimony of Ms. Bell and I think I suggested somewhat similar language. If they are controlling Federal funds and disbursing Federal funds, the issue of corruption could arise and partisan political abuses could arise. But if they are merely an employee whose employment is connected with the federally funded activity, there is almost, there is such little chance for corruption that may be one way to parse the legislation, absolutely, and to allow most State and local employees to be freed up to engage in that kind of outside activity outside of the job.

Mr. DAVIS. Would it appear or would it be fair to suggest that the Hatch Act, as we know it, does in fact prevent individuals from exercising part of their constitutional right as an American?

Mr. MASKELL. I don't think there is any question that in many instances Federal employees or State and local employees would want to exercise certain first amendment rights that they are not able to now. Now the courts have said that even though it does involve first amendment rights for Federal employees because of the employer-employee relationship they can restrict these first amendment rights more than they can of people in the general population. And because of State and local governments, because of the spending power of Congress, they could put limitations on it, but absolutely there is no question that it impacts the first amendment rights of these employees who are covered.

Mr. DAVIS. Ms. Bell, how do you respond to the testimony that allowing these individuals to run for office would create a number of problems and difficulty relative to managing operations that they may be a part of?

Ms. BELL. I disagree. Most of the employees represented by AFSCME are not in the position of managing or distributing Federal funds in their normal day-to-day operations. These are the line workers. These are the transportation workers that you see on the roads. These are the people that never meet the public. These are the ones in the back rooms who are entering data, who are clerking. These are the corrections officers who are managing the prisons and don't have any contact with the general public.

In 1939, a civil service job might have been the highest job available at that time. Training could be implemented in order to assure that when you take a civil service job, you are made aware of the possible prohibitions of the Hatch Act. You don't take a job thinking that one of these days, 10 years from now, I want to run for

Governor or the State legislature. You take that type of job because you are interested in either nowadays having a job or being a public servant. So I don't think it is going to cause that big of a problem.

Mr. DAVIS. Mr. Maskell, you were about to comment.

Mr. MASKELL. I'm not sure what the effect would be. My guess is based on other reform and loosening up of the Hatch Act that there will not be significant abuses and coercion involved. Almost every State has their own standards of conduct, conflict of interest, ethics, and kind of Hatch Act provisions that strictly regulate what you can do and can't do on the job and very much use similar language of the Federal Hatch Act for Federal employees, as well are not allowed to use their official authority or influence to affect an election. Those still all are in effect. So I'm not sure what it would be. And that is something that you all have to balance that, you know, you would like to free them up and see if you can minimize the potential or the risk for that happening.

Mr. DAVIS. Thank you both very much.

Ms. Norton.

Ms. NORTON. Mr. Chairman, I regret that another hearing kept me from being here because I think this is a very important issue, and I certainly agree that first amendment rights are significantly curtailed. Generally one would want to inquire constitutionally in return for what? When one weighs equities on each side, is the equity toward so-called corruption so great as to warrant denial of the right to run for public office? I would like to think a lot more about this.

You know, when it comes to line workers running for things like the school board, it's pretty hard to think of why, if anything, would want to have to encourage people to do so. Where there is a State Hatch Act, where I presume these workers would still be covered, one begins to wonder what is the particular function of the Federal Hatch Act in those cases.

Mr. Maskell, perhaps you could tell us, is there some redundancy there? If there is a State Hatch act already and if these employees would be covered under that State Hatch Act, what special or unique function does the Federal Hatch Act play such that piling it on top either gets us anything that the State Hatch Act won't get us or that otherwise makes us understand that it's necessary to have two laws affecting these citizens?

Mr. MASKELL. Well, you are absolutely right. There are redundancies and a number of the States have somewhat similar provisions that the Federal law has. But again there are a lot of States that have reformed their so-called little Hatch Acts and have freed up their own employees quite a bit, so that Michigan, for instance, does not prohibit their State employees running for election in a partisan election. So the Hatch Act isn't redundant because the Federal law does restrict them if their job is in connection with the federally funded activity.

So in some cases there are redundancies and in other cases there aren't. It was passed originally as a protection concerning the disbursement and utilization of Federal funds, and I think we can all agree it has kind of moved away from that. I don't know if it's an unintended consequence, but it may be unanticipated, something

that was not anticipated, at least to the extent it is now. Because of the pervasiveness of Federal funding of local activities it has reached a lot of activities at the State and local level that it never reached and wouldn't reach in 1940.

Ms. NORTON. Would an earmark reach that employee?

Mr. MASKELL. Sure. It could. If it's a State or local agency, a governmental agency, sure.

Ms. NORTON. Yes, a State or local agency. Lobbying wouldn't be affected by this, would it?

Mr. MASKELL. No. Lobbying isn't involved. This is partisan political activity, meaning relating to a political party. Most lobbying activities are done in nonpartisan—they are not associated with one political party or another or the success or failure of a candidate, and therefore they are generally not covered under the Hatch Act.

Ms. NORTON. Oh, my goodness, I think that is where you get into some difficulties. One party may be very much for raising taxes and another party may not be. The Federal Government's notion that it's either all or nothing comes because it sometimes doesn't put the time into thinking through how to grant as much as possible while affording the appropriate protections.

I would be—and this really comes out of a lot of the work we do in the Congress and I don't know if it would be applicable—I'm always fearful of appearances, because much of what we frankly associate with unethical or corrupt activity often doesn't have to do with action that someone takes but with creating the impression of authority that you really don't have. There might be a great temptation to do so if your agency is funded. In my judgment, it might take some reworking of the regulations. I would err on the side of granting constitutional rights always, but I have to—and by the way, I am particularly mindful of people who work in communities such as Mr. Stupak's legislation pertains to. That is all there is, is government employment. It does seem to me that kind of blanket denial, I don't know who can run for office? Rich people from out of town? I'm not sure. It does seem to me that something has to be done. If we were to spread this it would put a real burden on the State Hatch Act, but one I'm prepared to believe the States are prepared to accept. And to the extent that this is an exception, then it does seem to me we would have to spell out what it means because of the appearance, for example, that someone, I mean the school board. Well, you know, that is a common and very ordinary kind of very important activity, but I must say, the schools get funds. So you know one begins to think like a lawyer and then this stuff gets all messed up again. Because surely the school board has something to do with that.

Many jurisdictions now have nonpartisan elections. I'm not sure what that means in terms of this legislation or what we're after, but they don't run under any particular party. I don't know if that has been discussed before I came here. Are those people already exempt?

Mr. MASKELL. If they're running in a nonpartisan election and no candidate——

Ms. NORTON. You can run for mayor in a nonpartisan election.

Mr. MASKELL. Right, then they're allowed to run. But what you're saying is absolutely correct because what we're seeing, at

least in the communities that I know of in Northern Virginia, the candidates get endorsed by political parties, the political parties send out their literature saying Joe Smith, he is the Democratic candidate or he is the Republican candidate and all and even though it's, quote, nonpartisan, you know who the parties are supporting in any event and so you are right, it loses——

Ms. NORTON. What is the point in the nonpartisan elections? You are absolutely right. Nobody really runs nonpartisan, so do you know what the original reform was designed to do? Because if it was to break people away from parties it has been a complete failure.

Ms. BELL. I believe the original intent was to allow interested people to run on their own individual platforms, to run on the I'm a parent, that I'm a member of this community and that I am involved in, especially, like school boards and smaller commissions. But as the political machine has grown, those type of positions have become training grounds for higher positions, and therefore the parties and even the independents and the third parties have learned that we have to pay attention as they come up through the ranks in order to prepare for future Republicans and future Democrats within our entire system.

Ms. NORTON. Mr. Maskell, how high up does a nonpartisan election in Virginia go?

Mr. MASKELL. Well, the Fairfax County School Board is nonpartisan, but the county supervisor, the county office is partisan. Arlington has their own parties. They have that Arlington Better Government Party. They have nonmajor parties that they have labels for their council, so it really depends on the jurisdiction and locality. But of course you can run as an independent in most of these communities even if it's a partisan election if you are a Federal employee, but not if you are a State or local government employee. You are not allowed to.

Ms. BELL. And we have some township trustees that are nonpartisan.

Ms. NORTON. I think, Mr. Chairman, every so often the Hatch Act gets a going over. I think in light of this proposal I suggest that the time may be at hand again. I also suggest, Mr. Chairman, that if you want to see something really ridiculous all District government comes under the Federal Hatch Act. Shortly after coming into Congress I got it freed at last, except it didn't last into the Senate. And I have to tell you, the kind of confusion, I would look to see something that makes it easy for the average person to understand. The kind of confusion that you have, even when you speak of nonpartisan elections, we have ANC commissioners. Actually that is something that comes from an election that came from the original Home Rule Act. It was the idea of some member who sat, who brought in from his own jurisdiction was nonpartisan. Well, the office of the counsel, or whatever it's called, has on some occasions given the opinion that these people were, that you could hold a Federal or local job and run for this nonpartisan position. Then on the other hand—and understand, they are applying only Federal law because D.C. doesn't have its own law. And then on the other hand, others have questioned it. So what you have now is probably at least half a dozen members of the D.C. City Council who had

been ANC commissioners and ran as ANC commissioners. I can name one off the top of my head, Adrian Fenty, who then ran for the council.

So the confusion leads people to hold up their hands and say, fine, sue me. So, I am asking, Mr. Chairman, I understand it may have been noted that D.C. be taken all together out of the Federal Hatch Act, at least you have a State Hatch Act in the States. Whether or not this dual constriction is necessary I think is something that ought to be investigated.

Mr. DAVIS. Thank you.

Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman. One question if I may Mr. Maskell. I'm looking at the CRS report, page 5, where they talk about provisions of State and local law. So that the suggestions that Ms. Bell made, let's say, like limited to discretion of Federal money or policy or the 25 percent threshold of funds from Federal Government, that won't work because the Federal law would still supersede the State law because the suggestions that Ms. Bell made would be less restrictive than Federal law, right?

Mr. MASKELL. Well, you would change the Federal—I think we're talking about changing the Federal laws as it applied to State——

Mr. STUPAK. Right, but Ohio could not enact what Ms. Bell suggested. They would still be in violation of the Federal Hatch Act.

Mr. MASKELL. Exactly.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much, and let me just ask, I'm trying to discern the difference between running as a partisan and running as a nonpartisan. Have either of you noted any discernible differences?

Ms. BELL. Not in the enthusiasm level.

Mr. DAVIS. I think of some school board elections that I have, you can't get any more striking than some of those have been, and they were all nonpartisan. And I think that it may very well be time to rework the Hatch Act in terms of its intent. I am finding it difficult to know what it really is designed to do.

Well, let me thank both of you for your testimony and for being here with us. I want to thank you, Mr. Stupak, for being with us this afternoon. If there are no further questions, then this hearing is adjourned.

[Whereupon, at 3:30 p.m., the committee was adjourned.]

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